(1)

84- 989

No.

Supreme Court, U.S.
FILED
DEC 17 1984
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NEWSPAPER DRIVERS AND HANDLERS, LOCAL NO. 372,
a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

OAKLAND PRESS COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

GERRY M. MILLER
788 North Jefferson Street
Milwaukee, Wisconsin 53202
414/271-4500
Attorney for Petitioner

Of Counsel:
LARRY R. STEFFES
GOLDBERG, PREVIANT, UELMEN,
GRATZ, MILLER & BRUEGGEMAN, S.C.
788 North Jefferson Street
Box 92099
Milwaukee, Wisconsin 53202
414/271-4500

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

30 PP

QUESTION PRESENTED

Are district managers who oversee and recruit newspaper carriers "supervisors" excluded from collective bargaining rights under §2(11) of the Act because the carriers, who are mostly 12 year old children earning $2.00 per hour and working after school for five hours per week for no more than six months to a year, cannot on policy grounds be deemed non-employees under §2(3) of the statute and because, despite the newspaper's past treatment of them as independent contractors and the certification of a collective bargaining representative for the district managers based on that characterization, the carriers are not acutally independent contractors based solely on close scrutiny of the degree of control exercised over their work?

PARTIES

Petitioner Newspaper Drivers and Handlers Local Union No. 372, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Petitioner" or "Union") is a labor organization within the meaning of Section 2(5) of the Act, 29 U.S.C. §152(5).

Respondent National Labor Relations Board ("NLRB" or "Board") is an agency of the United States established under Section 3(a) of the Act, 29 U.S.C. §153(a).

Respondent Oakland Press Company, a subsidiary of Capital Cities Communications, Inc. ("Employer" or "Company"), is engaged in the business of publishing and printing a daily newspaper of general circulation in Oakland County, Michigan. It is an employer engaged in interstate commerce within the meaning of Section 2(2), (6) and (7) of the Act, 29 U.S.C. §152(2), (6) and (7).

TABLE OF CONTENTS

	Page
Question Presented	i
Parties	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Statutory Provisions Involved	3
Statement Of The Case	3
A. Factual Background	3
B. Course of Proceedings	5
Reasons For Granting The Writ:	
A. District Managers Are Not Supervisors Without Bargaining Rights Under The Act Because, As The Board Correctly Determined In Its Initial Decision, The Carriers They Recruit And Oversee Are Not Employees Within The Meaning Of The Act	8
1. This Court's Holding In *United Insurance* Does Not Preclude The Implicit Exclusion Of The Carriers From The Purview Of §2(3) On The Basis Of Legislative Purpose	10
2. The Sixth Circuit's Initial Decision Improperly Barred The Board From Applying Established Precedent Dictated By Important Considerations Of Industrial Stability To The Issues Here	17

B. Because The Rulings Below Threaten Industrial Stability By Permitting Virtually Any Newspaper Whose Circulation District Managers Have Union Representation To Put At Risk Or Hold Hostage The Collective Bargaining Relationship, Special And Important Reasons Warrant Grant Of The Writ In This Case 21

Conclusion 23

TABLE OF AUTHORITIES

Cases:

Ace Doran Hauling & Rigging Co. v. NLRB, 462 F.2d 190 (6th Cir. 1972) 16

Allied Chemical & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971) 16

Beasley v. Food Fair, Inc., 416 U.S. 653 (1974) 21

Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327 (1967) ... 7

Buffalo Couriers Express, Inc., 129 NLRB 932 (1960) .. 17

Cedars-Sinai Medical Center, 223 NLRB 251 (1976) 12

Eureka Newspapers, Inc., 154 NLRB 1181 (1965) 17

Firmat Mfg. Corp., 255 NLRB 1213 (1981) 11

Hamilton-Brown Shoe Co. v. Wolf Bros., 240 U.S. 251 (1916) 7

Hawkes v. Internal Revenue Service, 507 F.2d 481 (6th Cir. 1974) 9

Kansas City Star Co., 76 NLRB 384 (1948)..... 17

Key Opportunities, Inc., 265 NLRB 1371 (1982) 9, 11

Mercer v. Theriot, 377 U.S. 152 (1964) 7

NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974) . . 9, 11, 13, 18

NLRB v. Hearst Publications, 322 U.S. 111 (1944) . . . 13, 15, 16

NLRB v. Hendricks County Rural Electric Membership Corp., 454 U.S. 170 (1981) 9, 11, 13, 18

NLRB v. News Syndicate Co., 365 U.S. 695 (1961) 21

NLRB v. United Insurance Co., 390 U.S. 254 (1968) . . 9, 10, 12, 13, 14, 15, 17

Newsday, Inc., 171 NLRB 1456 (1968) 17, 19

Newspaper Drivers and Handlers Local Union No. 372 v. NLRB, 682 F.2d 116 (6th Cir. 1982) (per curiam) 2, 7, 19

Newspaper Drivers and Handlers Local No. 372 v. NLRB, 735 F.2d 969 (6th Cir. 1984) 2, 7, 9

Oakland Press Co., 229 NLRB 476 (1977) 2, 5

Oakland Press Co., 249 NLRB 1081 (1980) 2, 6

Oakland Press Co., 266 NLRB 107 (1983) 2, 7

Oakland Press Co. v. NLRB, 606 F.2d 689 (6th Cir. 1979) 2, 6, 10

Philadelphia Newspapers, Inc., 238 NLRB 835 (1978) . . 20

Ray Brooks v. NLRB, 348 U.S. 96 (1954) 21

San Antonio Light, 130 NLRB 619 (1961) 17

San Francisco Art Inst., 226 NLRB 1251 (1976) 9, 11, 12

Seafarers Local 777 v. NLRB, 603 F.2d 862 (D.C. Cir. 1979) 19

Suburban Newspaper Group, 195 NLRB 438 (1972) 17

United States Gypsum Co., 157 NLRB 652 (1966) 21

The Virginian Pilot/Ledger Star, Capital Division of Landmark Communications Inc., 241 NLRB 575 (1979) 20

Statutes:

28 U.S.C. § 1254(1) 3

29 U.S.C. § 151 *et seq.* 3

29 U.S.C. § 151 8

29 U.S.C. § 152(2) ii

29 U.S.C. § 152(3) ..... i, ii, 3, 10, 11, 12, 13, 15, 16

29 U.S.C. § 152(5) ii

29 U.S.C. § 152(6) ii

29 U.S.C. § 152(7) ii

29 U.S.C. § 152(11) ..... i, 3, 11

29 U.S.C. § 153(a) ii

29 U.S.C. § 158(a)(5) 5

29 U.S.C. § 160(f) 7

29 U.S.C. § 164(a) 21

29 U.S.C. § 1053 21

Other Authorities:

H.R. Rep. No. 245, 80th Cong., 1st Sess. 18 (1947) 15, 16

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NEWSPAPER DRIVERS AND HANDLERS, LOCAL NO. 372,
a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

OAKLAND PRESS COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To The Honorable, The Chief Justice Of The United States Supreme Court And The Associate Justices Of The Supreme Court Of The United States:

Petitioner respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The issues presented in this petition have been the subject of litigation for over seven years. An Administrative Law Judge, three panels of the Board, and three panels of the United States

Court of Appeals for the Sixth Circuit have rendered hopelessly inconsistent decisions in this case. These decisions are set out chronologically below.

The decision of the Administrative Law Judge ("ALJ") is reported as an attachment to the first decision of the NLRB at 229 NLRB 476; it is reproduced as Appendix E (A- 23-29).

The first decision and order of the NLRB, which affirmed the ALJ's decision, is reported as *The Oakland Press Co.*, 229 NLRB 476 (1977); it is reproduced as Appendix D (A- 20-21).

The first decision of the Sixth Circuit, which remanded the case to the Board, is reported as *Oakland Press Co. v. NLRB,* 606 F.2d 689 (6th Cir. 1979); it is reproduced as Appendix B (A-6-14).

A supplemental decision and order of the NLRB is reported as *The Oakland Press Co.*, 249 NLRB 1081 (1980); it is reproduced as Appendix F (A- 40-50).

The second decision of the Sixth Circuit, which remanded the case in part to the Board, is reported as *Newspaper Drivers and Handlers Local Union No. 372 v. NLRB,* 682 F.2d 116 (6th Cir. 1982); it is reproduced as Appendix C (A- 15-19).

The second supplemental decision of the NLRB is reported as *The Oakland Press Co.*, 266 NLRB 107 (1983); it is reported as Appendix G (A-51-55).

The third decision of the Sixth Circuit is reported as *Newspaper Drivers and Handlers Local No. 372 v. NLRB,* 735 F.2d 969 (6th Cir. 1984); it is reproduced as Appendix A (A-1-5).

JURISDICTION

The last decision of the court of appeals in this matter issued on May 31, 1984. A petition for rehearing, which was timely filed, was denied on August 15, 1984. By order of this Court

dated November 2, 1984, the time for filing a petition for writ of certiorari was extended to and including December 17, 1984. This petition is being filed within the time period specified by that extension.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. §151, *et seq.* are set out in Appendix K (A- 60-62).

STATEMENT OF THE CASE

A. Factual Background.

The Union has been the certified bargaining representative of the Company's circulation department district managers since 1971, when it won a representation election. Beginning in 1970, the Company recognized the district managers as employees under Section 2(3) of the Act; the Company also characterized its newspaper carriers as independent contractors (A- 2).

Subsequent to certification as the district managers' bargaining representative, the Union and the Company negotiated and entered into two successive collective bargaining agreements (A-53). When the second collective bargaining agreement was about to expire, the Company reversed its earlier position and refused to bargain with the Union, asserting for the first time that the district managers were supervisors under Section 2(11) of the Act because the carriers were actually employees rather than independent contractors (A- 2).

The district manager bargaining unit consists of approximately 15 employees who are responsible for the sale, promotion and delivery of newspapers within a specific geographic area (A- 2). The collective bargaining agreements entered into between the Company and the Union on behalf of the district managers pro-

vided for employee benefits which, among other things, required weekly pension premium payments into a jointly administered pension plan. Continued contributions and eligiblity for benefits under such plans depend upon continuation of the collective bargaining relationship. The agreements also provided for job security by limiting layoffs to a strict seniority standard (A-63-64).

The majority of the Company's 1250 newspaper carriers are children of approximately 12 years of age who deliver the papers on foot, skateboard, bicycles, or horseback. They deliver on the average about 50 papers per day to customers in their neighborhoods, and make about four cents profit per paper. These children typically keep their routes for a period of six months to a year (A- 25-26). About 35 of the carriers are adults who deliver 175-200 newspapers each day by automobile in rural areas (A- 25). The carriers are directly responsible to the district managers in the Company's organizational scheme (A- 41). All carriers are required to sign the Company's "Independent Carriers Route Agreement", which grants them the exclusive right to service any and all home delivery subscribers of the newspaper on their route (A- 41). No one else in the Company's circulation department signs these or any other contracts. The accident insurance policy which the Company makes available to carriers is voluntary, essentially at the carrier's cost, and refers to the carrier as "independent contractor." (A- 43). Likewise, the Company does not consider carriers to be employees for purposes of income tax withholdings, social security, unemployment compensation or worker's compensation (A- 43).

Carrier earnings are determined by the number of papers they can sell and collect for (A- 45-46). If they order papers but cannot sell them, carriers receive no credit for returns. Carriers can extend credit to their customers, but bear the risk of any loss which results (A- 46). They hire and pay their own substitutes (A- 41). They select their method of delivery and furnish or

purchase whatever equipment they need other than the route book (A- 43). After initial recruitment, they essentially work by themselves and within broad limits arrange their own delivery, billing, and collection schedules. Carrier participation in the employer's contests and promotional campaigns is voluntary although expected (A- 42, 45). A route area will normally only be reduced at the request of a carrier although the district manager has the unilateral right to change the size (A- 46).

Except for the fact that most carriers now mail in their payment each week, rather than turning the money into the district manager, there has been no change in the working relationship between the carriers and the Company over the period since the Union was certified to represent the district managers; the ALJ found that the employer "has always treated the carriers as non-employees, and still does". (A-26, 65).

B. Course of Proceedings

The procedural history of this case dates back to May 6, 1977 when the Board issued a decision and order adopting, *inter alia,* the ALJ's finding that the newspaper carriers of the Company were not employees and that therefore the district managers were not statutory supervisors but rather employees with respect to whom the employer had refused to bargain in violation of Section 8(a)(5) of the Act. Thus the Board, in its original decision, agreed with the ALJ that the Company had "clothed [the carriers] with indicia of independent contractors", and that it had "always treated the carriers as non-employees, and still does", so that under established law it was not essential to determine whether the carriers were actually independent contractors. The Board also agreed that: "From the record as a whole, it is clear that the Respondent's [i.e. the employer's] contention that these carriers are employees is taken for the purposes of this case only." *See The Oakland Press Co.,* 229 NLRB 476 (1977) (A- 26).

The Company petitioned the United States Court of Appeals for the Sixth Circuit to review and set aside the Board's Order, and the Board filed a cross-application for enforcement of its order. On October 4, 1979, the court of appeals remanded to the Board the issue of the carriers' status, holding that they had to be classified as either employees or independent contractors. *See Oakland Press Co. v. NLRB,* 606 F.2d 689 (6th Cir. 1979) (A- 6-14).

On June 6, 1980, the Board accepted the remand and issued a supplemental decision and order in which it found that the carriers were employees and that the district managers were supervisors within the meaning of the Act. *See The Oakland Press Co.,* 249 NLRB 1081 (1980) (A- 40-50). Because it accepted the remand, the Board had to decide whether the carriers were independent contractors or employees under the Act (A- 45). In finding that the carriers were employees, the panel majority relied on indicia of control the district managers had over the carriers, the absence of a proprietary interest on the part of the carriers, and their limited opportunity for significantly increasing their income or incurring substantial losses. The panel majority, however, gave little or no weight to the employer's prior characterization of the carriers as independent contractors, noting merely that "more recent" agency decisions supported its reversal of position at this point. (A- 47). The dissenting member would have held the newspaper to its past characterization of the carrier relationship. (A- 48-50).

The Union appealed the Board's supplemental decision and order to the Court of Appeals for the Sixth Circuit. On June 29, 1982, the court affirmed the Board's order with respect to the determination that the carriers were employees under the Act; the court found that there was substantial evidence to support this determination. The court, however, did remand to the Board the determination as to whether the Company should be "equitably estopped from asserting a position completely inconsistent with its past conduct and representations". *See*

Newspaper Drivers and Handlers Local Union No. 372 v. NLRB, 682 F.2d 116 (6th Cir. 1982) (A- 15-19).

In its second supplemental decision dated February 7, 1983, the Board concluded that equitable estoppel, whereby the Company is equitably estopped from denying the employee status of its district managers and refusing to bargain collectively with the Union, was not applicable, and even if it did lie, the requisites for application of the doctrine of equitable estoppel were not present in this case. *See The Oakland Press Co.,* 266 NLRB 107 (1983) (A- 51-55).

The Union again appealed the Board's second supplemental decision and order to the United States Court of Appeals for the Sixth Circuit. On May 31, 1984, exercising its jurisdiction under Section 10(f) of the Act, 29 U.S.C. §160(f), the court below affirmed the Board's decision and order on the equitable estoppel issues. However, the Court did note in no uncertain terms its disagreement with the Board's resolution of the underlying issue in the case: that is, whether the newspaper carriers were employees and consequently whether the district managers were supervisors. *See Newspaper Drivers and Handlers Local No. 372 v. NLRB,* 735 F.2d 969, 970 n.** (6th Cir. 1984) (A- 3-4). The question raised in this petition, i.e., the issue which divides the Sixth Circuit's third panel and the Board, is now ripe for review by this Court.[1]

---

[1] In the exercise of its jurisdiction, this Court has long adhered to the policy of reviewing only final judgments, except in extraordinary situations. *Hamilton-Brown Shoe Co. v. Wolf Brothers,* 240 U.S. 251, 257-258 (1916); *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co.,* 389 U.S. 327, 328 (1967). However, upon review of a final judgment, this Court may reach questions determined in any stage of the litigation. *Hamilton-Brown Shoe Co. v. Wolf Brothers,* 240 U.S. at 257; *Mercer v. Theriot,* 377 U.S. 152, 153, 154 (1964).

REASONS FOR GRANTING THE WRIT

A. District Managers Are Not Supervisors Without Bargaining Rights Under The Act Because, As The Board Correctly Determined In Its Initial Decision, The Carriers They Recruit And Oversee Are Not Employees Within The Meaning Of The Act.

It is the declared purpose of the federal labor statute to promote and encourage stable collective bargaining relationships as an alternative to industrial strife. See 29 U.S.C. § 151. The result in this case, however, undermines rather than promotes this purpose.

The key rulings below, i.e., that of the Sixth Circuit's first panel and the Board on remand, permit an employer to destroy an established collective bargaining relationship, as well as all of the rights that grow out of it, by the artifice of claiming that individuals it has previously treated and characterized as non-employees (the carriers) are actually employees and therefore that those who recruit and oversee them (the district managers) are supervisors without statutory collective bargaining rights. The rulings below allow this ploy even though no claim has been or could be voiced that operational changes since the beginning of the bargaining relationship warranted the change in characterization. Indeed, the rulings below sustain this claim while permitting the employer to maintain that for all purposes *except* collective bargaining the carriers are still non-employees. This bizarre holding rests on the absurd premise that unorganizable teenagers who work for several hours after school, earn $2 per day and keep the job for no more than six months to a year are, as opposed to full-time people who are making their careers in newspaper circulation, the "employees" for whom Congress legislated collective bargaining rights.

The last decision of the Sixth Circuit declared this absurdity and discerned the error that let to it but was unable to correct it for reasons that do not limit this Court.

> The law of the case requires that we accept the Board's determination that the newspaper carriers are employees. See, e.g., *Hawkes v. Internal Revenue Service,* 507 F.2d 481, 481 n.1 (6th Cir. 1974). *Nonetheless, we feel compelled to note our disagreement with this decision.* It is difficult to imagine that twelve year old children working five hoiurs a week for two dollars an hour, are the type of people to whom Congress intended to extend the protection of the National Labor Relations Act. It is even more difficult to imagine that such a group would, or even should, ever organize. To us, these children are much like the sheltered workshop people in *Key Opportunities, Inc.,* 265 NLRB No. 178 (1982), and the part-time student janitors in *San Francisco Art Institute,* 226 NLRB 1251 (1971), whom the Board has already determined are not employees for purposes of the Act. The only practical effect of this decision is to exclude from the Act a group of employees [the district managers] whom Congress surely intended would be covered by it.
>
> *Newspaper Drivers & Handlers Local No. 372 v. NLRB,* 735 F.2d 969, 970 n.** (6th Cir. 1984) (App. 3-4) [emphasis added].

The primary source of this error was the Sixth Circuit's initial ruling, apparently prompted by a misreading of this Court's decision in *United Insurance*[2] and at war with this Court's *Bell Aerospace*[3] and *Hendricks County*[4] decisions, that the Board could not hold workers implicitly excluded from statutory employee status on legislative purpose or policy grounds. As a result, on remand, a divided Board departed from its long-

---

[2] *NLRB v. United Insurance Co.,* 390 U.S. 254 (1968).

[3] *NLRB v. Bell Aerospace Co.,* 416 U.S. 267 (1974).

[4] *NLRB v. Hendricks County Rural Electric Membership Corporation,* 454 U.S. 170 (1981).

standing previous policy of holding the newspaper to its past characterization of carriers as non-employees and, reversing its initial decision, held the district managers to be supervisors.

1. This Court's Holding In *United Insurance* Does Not Preclude The Implicit Exclusion Of The Carriers From The Purview of §2(3) On The Basis Of Legislative Purpose.

In rejecting the Board's initial decision and order in this case, the first panel of the Sixth Circuit concluded that the ALJ's determination that "as a matter of policy" the carriers should not be treated as employees was erroneous.

> The determinative factor with respect to this issue is whether the paper carriers are employees of Oakland or are independent contractors.
>
> * * *
>
> We cannot accept the finding that, as a matter of policy, they are not employees. Whose policy? They are entitled to be definitely classified under the statute. Either they are legally employees or, according to law, they are not employees.
>
> We remand the case to the Board for determination of the legal status of these paper boys with reference to their employment relationship to Oakland.
>
> *Oakland Press Co. v. NLRB,* 606 F.2d 689, 692-693 (6th Cir. 1979) (App. 14).

On remand, the Board cast the issue to be resolved in the case as narrowly—whether the news carriers were independent contractors or employees under the Act. In resolving this issue, the Board looked only to right-to-control considerations, giving little or no weight to other relevant if not dispositive factors such as the employer's prior characterization of the carrier relationship and statutory purposes. (App. 45-47).

The conclusion of the Board and the court of appeals that the carriers must be either employees or independent contractors is a false dichotomy. It assumes that there are no *implicit* exclusions to the term "employee" as set out under §2(3) of the Act, and that assumption conflicts with several controlling decisions of this Court holding that certain categories of workers are *implicitly* excluded from statutory employee status on policy grounds. *See NLRB v. Bell Aerospace Company,* 416 U.S. 267 (1974) [sustaining Board policy to exclude managerial personnel from statutory employee status because not within legislative purpose]; *See also NLRB v. Hendricks County Rural Electric Membership Corp.,* 454 U.S. 170 (1981) [upholding Board policy to exclude "confidential employees" having a "labor-nexus" from statutory definition of employee for policy reasons].

The result here also ignores recent decisions by the Board itself which indicate that the employee versus independent contractor polarity is unduly simplistic. Under the rationale of these cases the carriers need not fit neatly into one category or the other. See *Key Opportunities, Inc.,* 265 NLRB 1371 (1982) [where, although the employer operated a sheltered workshop for the handicapped who worked for wages under the direct charge of Key personnel at tasks similar to those performed by admitted employees and who were subject to discipline, including discharge by Key, the Board held Key's handicapped workers not to be §2(3) employees by reference to the statutory purposes although "no doubt 'employees in the generic sense of the term' " and not explicitly excluded by the Act; accordingly Key's workers who oversee them are not §2(11) supervisors]; *Firmat Mfg. Corp.,* 255 NLRB 1213 (1981) [where a high school cooperative education student hired as an apprentice to work part time during the school year, full time during the summer, with steady employment upon graduation, was held not an employee for purposes of the Act]; *San Francisco Art Institute,* 226 NLRB 1251 (1976) [where the Board ruled ineligible for col-

lective bargaining student janitors with high turnover and brief tenure who received less pay than regular janitors and worked only 20 hours a week to accomodate their school commitments][5]; *Cedars-Sinai Medical Center,* 223 NLRB 251 (1976) [where the Board held hospital interns and residents implicitly excluded from the Act's definition of employee].

The basis for the Board's assumption that the carriers could not be implicitly excluded from the Act on policy grounds appears to be a misreading by the Sixth Circuit's first panel of this Court's holding in *United Insurance.*[6] There, this Court concluded that it was Congress' purpose to have the Board and courts apply general agency principles (the right-to-control test) when distinguishing between the terms "employee" and "independent contractor" under the Act.

---

[5] In *San Francisco Art Institute* the agency's rationale emphasized factors that are clearly present in this case.

> "We are influenced in our decision chiefly by the brief nature of the student's employment tenure, by the nature of compensation for some of the students, and by the fact that students are concerned primarily with their studies rather than with their part time employment. In our view, the student janitors are best likened to temporary or casual employees, whose certification would present unusually vexsome problems."
>
> *Id.* at 1251.

[6] Although not specifically cited by the Board or the Sixth Circuit in the proceedings below, it appears that *United Insurance* is the source of this false dichotomy and the resultant simplistic application of the right-to-control test. In its main brief to the first panel of the Sixth Circuit, the Company principally argued that every worker was an employee under §2(3) unless specifically covered by one of the explicit exclusions in the section (that is, for purposes of this case, the carriers were either employees or excluded as independent contractors), and that employment status could not be based on "economic and policy considerations" but rather solely on the common-law agency (right-to-control) test. *United Insurance* is prominently cited as authority for each of the Company's arguments.

In setting out this standard, the Court stated:

> Initially this Court held in *NLRB v. Hearst Publications,* 322 U.S. 111, 88 L.Ed 1170, 64 S.Ct. 851, that "whether...the term 'employee' includes [particular] workers...must be answered primarily from the history, terms and purposes of the legislation." 322 U.S. at 124, 88 L.Ed at 1181. Thus the standard was one of economic and policy considerations within the labor field. Congressional reaction to this construction of the Act was adverse and Congress passed an amendment specifically excluding "any individual having the status of an independent contractor" from the definition of "employee" contained in §2(3) of the Act. The obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act.
>
> *Id.* at 256. (footnote omitted)

This language appears to be the basis for the Sixth Circuit's and the Board's conclusion that the carriers could not be implicitly excluded from the Act for reasons of legislative purpose and policy but that they were excluded only if determined to be independent contractors after exclusive application of the right-to-control test. While the Court in *United Insurance* was confronted with the issue of whether certain workers were employees or independent contractors under the Act and did apply common law principles of agency to resolve that issue, the case does not hold that a rigid employee - independent contractor dichotomy must be Procrusteanly applied to all cases involving the question of employee status or independent contractorship under §2(3), thereby precluding the Board or the courts from finding any *implicit* exclusion from the statutory definition; it was surely not the intent of *United Insurance* to require an exclusive application of the right-to-control test at the expense of all statutory policy and purpose considerations. *Bell Aerospace* and *Hendricks County* certainly teach otherwise.

In *United Insurance,* this Court was not confronted with a situation like that in this case. There, the Court was faced solely with the issue of whether a previously unorganized group of workers (debit agents) were employees or independent contractors under the Act. Thus, unlike this case, there was no additional basis for excluding the debit agents from employment status in *United Insurance.* Moreover, the continued existence of an established collective bargaining relationship and its attendant rights and benefits was not in the balance. In addition, the employment relationship of only one group of workers vis-a-vis the company was involved. Under these circumstances the single-minded application of the right-to-control test was appropriate. A much different analysis would have been required, however, had resolution of the debit agents' employment status impacted on the status of another group of workers, if additional considerations appeared to warrant their exclusion from statutory employment status, and if that group was party to an established collective bargaining relationship with the employer founded upon its characterization of the relationship with the other group.

In fact that is the factual scenario involved in this case. Here, even if not independent contractors there are additional grounds to exclude the carriers from employment status. And here determination of the employment status of the newspaper carriers is of fundamental importance only with respect to determining whether *another* group of employees, the district managers, are entitled to *continued* protection under the Act.

The carriers' employment status, for purposes of determining their rights under the Act, is not, by itself, of any significance. In fact, as the third panel of the Sixth Circuit noted, the carriers themselves are not directly involved in the determination as to whether they are employees or independent contractors; their status is only collaterally in question here. More importantly, the origins of the district managers' current employment status is intertwined with the company's past characterization of the

carriers as independent contractors; the collective bargaining relationship that has developed between the district managers and the company is based on the Company's prior consistent representation that the managers, not the carriers, were employees. The ALJ recognized this when he found that:

> From the record as a whole it is clear that the Respondent's [Company's] contention that these carriers are employees is taken for the purpose of this case only. (A- 26).

To reject the established collective bargaining rights of *the district managers,* as the Court of appeals and the Board ultimately did here, solely on the basis of a sterile application of the right-to-control test to *the newspaper carriers,* without any consideration of the circumstances which led to the formation and continuation of that collective bargaining relationship, is absurd. Such could surely not have been the intended scope of the holding in *United Insurance.*

Congress could hardly have intended, when it amended § 2(3) to exclude independent contractors, that the continued existence of established collective bargaining rights for one group of employees could be entirely dependent on the application, to an entirely separate group of workers, of a legal test (right-to-control) that evolved to determine whether a newspaper was liable in tort to third parties or for taxes, insurance or other statutory liability. Rather, in adding the independent contractor exclusion in 1947, Congress indicated that the Board had exceeded the standards and intent of the original Act by including independent contractors as employees in several cases. H.R. Rep. No. 245, 80th Cong., 1st Sess. 18 (1947). From time to time the Board had used the common law concept of independent contractor in determining whether an individual or group fell within the meaning of employee, placing prime emphasis on the employer's power of control. However, in *NLRB v. Hearst Publications,* 322 U.S. 111 (1944), the Board, with this Court's approval, departed from conventional (ordinary) definitions of "employee" and "independent contractor." In *Hearst,* the

Supreme Court affirmed the Board's determination that "news boys" were "employees" for purposes of collective bargaining. The House Committee report which accompanied the 1947 amendments contained specific criticism of the *Hearst* decision:

> An "employee", according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. But in the [Hearst] case...the Board expanded the definition of the term "employee".... "Employees" work for wages or salaries under direct supervision. "Independent contractors" undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods...and labor and what they receive for the end result, that is, upon profits.
>
> H.R. Rep. No. 245, 80th Cong. 1st Sess. 18 (1947).

However, even though the "independent contractor" exclusion constituted a specific repudiation of the result in *Hearst*, this Court has subsequently determined that it did not represent a total rejection of the *Hearst* approach. *See Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 168 (1971). Thus, while it is true that general agency principles must be considered when drawing the line between employees and independent contractors, one need resort additionally to economic and policy considerations to infuse § 2(3) with meaning. *Id.* at 168. The federal courts have in particular considered the undesirability of denying employee status under § 2(3) where this would contravene the stated purposes of the Act by disrupting a well established collective bargaining relationship. *See, e.g., Ace Doran Hauling & Rigging Co. v. NLRB*, 462 F.2d 190, 194 (6th Cir. 1972).

2. The Sixth Circuit's Initial Decision Improperly Barred The Board From Applying Established Precedent Dictated By Important Considerations Of Industrial Stability To The Issues Here.

In its initial decision the Board applied its well established *Newsday* doctrine in rejecting the Company's contention that its carriers were actually employees. The Sixth Circuit's first panel, based on a misreading of *United Insurance,* rejected the Board's tradional theory and remanded for a plenary determination of the carriers' status under the common law right to control test. Under its view of the contraints of the remand the agency departed from over thirty years of precedent and undertook a full-scale inquiry into whether a *collateral* group of workers were, on balance, independent contractors as the Company had consistently held them out to be or actually employees, contrary to its past characterization of the relationship. In forcing the Board to jettison thirty years of precedent to the contrary, the Sixth Circuits' first panel opened Pandora's box and set loose the mischief discerned by the third panel.

The agency's *Newsday* line of cases barred a newspaper from making the *ad hoc* contention that a collateral group of carriers were not actually independent contractors despite their past treatment and characterization as such in order to defeat unionization of the district managers. Obvious equitable and administrative considerations support this policy. See *Newday, Inc.* 171 NLRB 1456 (1968) [publisher "concedes it has always considered the carriers to be independent contractors. We accordingly find that the carriers are not employees"]; *Suburban Newspaper Group,* 195 NLRB 438 (1972) [record fails to establish that carriers are employees and not independent contractors "as the Employer holds out to the public"]; *Eureka Newspapers, Inc.,* 154 NLRB 1181, 1185 (1965); *Buffalo Courier Express, Inc.,* 129 NLRB 932, 937 (1960); *San Antonio Light,* 130 NLRB 619, 629 (1961); *Kansas City Star Co.,* 76 NLRB 384 (1948) [legislative history of 1947 amendment dic-

tates that the Board recognize as "employees" only those who work for wages or salaries under direct supervision].

These cases arose in an organizing context. If the employer's prior characterization of the employment status was of significance in that situation then it is a *fortiori* of more importance in the context of an *established* collective bargaining relationship where attendant rights and benefits are in the balance. Surely, if the doctrine bars plenary litigation of the status of a collateral group when the bargaining relationship is established it will be barred thereafter as well. The ALJ recognized the significance of the Board's traditional view of the law.

> ... The questions here is not so much whether a twelve year old who delivers newspapers one hour a day on a skate board is an entrepreneur, but whether as a matter of policy they (or the adults) should be treated as employees.
>
> Though the factors cited by the parties do have some bearing on whether one is found to be an independent contractor or not, there are additional, and important, considerations here.
>
> Specifically, the Respondent [Company] has always treated the carriers as non-employees, and still does. (App. 25-26)

When he held the Company to its past characterization of carrier status as non-employment he correctly applied established Board law. This policy-based line of authority is comparable to the "managerial" and "confidential" employee exceptions found acceptable on grounds of statutory purpose in *Bell Aerospace* and *Hendricks County.*

However, in its subsequent decisions the Board inexplicably reversed this long-standing policy of holding an employer to its prior characterization of collateral employee status. This change of directions seems to have two origins: 1) the Board's misreading of the *United Insurance* holding so as to preclude

consideration of statutory purpose and policy; and 2) a change in its membership. The previous section refuted the first source of error. An examination of the second follows:

The second panel of the Sixth Circuit noted that the "logic of this [the Board's] reversal appears to be entirely related to change in composition of the Board, since the following facts relied upon by the Board in its decision were all available at the time of the *Newsday* decision." *See Newspaper Drivers & Handlers Local No. 372 v. National Labor Relations Board,* 682 F.2d 116, 117 (6th Cir. 1982) (per curiam). (App. 16) While the Board has broad discretionary powers to carry out its responsibilities under the Act, such authority cannot be construed to permit *ad hoc* and blatantly inconsistent and contradictory judgments where the only determinative element seems to be the composition of the panel which happened to hear the case. The Board has no authority to treat similar situations dissimilarly; it has an obligation to make *principled* decisions—to follow, distinguish or overrule its own precedent. *Seafarers Local 777 v. NLRB,* 603 F.2d 862, 869-72 (D.C. Cir. 1979).[7]

---

[7] The unexplained about-face taken by the Board in this case is apparently not limited to circumstances involving news carriers. In *Seafarers Local,* the court examined in depth the course of the Board's decisions concerning whether cab drivers were employes or independent contractors under the Act. After examining the changing standards and conflicting decisions of the Board in this area, the court stated:

> Not only has the NLRB repeatedly reached diametrically opposite conclusions on the basis of virtually identical fact situations, but moreover it has done so in a series of opinions which typically offer no explanation for their result other than a recitation of the pertinent facts.
>
> *Id.* at 869 (citations omitted).

The Board majority in its supplemental decisions did not bother to mention, let alone distinguish or overrule the numerous cases in the past wherein it had held newspaper carriers not to be employees. Similarly, while in its original decision the Board gave substantial weight to the employer's characterization of the carriers as independent contractors, in its subsequent decisions it gave no weight to this factor at all.[4] This refusal to place any weight on prior characterization of the employment relationship has no other result than to exclude from the protection of the Act employees, district managers, who for the previous six years, had been classified as employees for purposes of collective bargaining despite the absence of any operational changes in their jobs.

As such, the Board's unexplained reversal of its prior precedent makes a mockery of the policies and purposes behind the Act. If the rights and protections provided under a collective bargaining agreement can be destroyed for no apparent reason other than that the Board changes its mind or politics, then the Act's purpose of establishing and stabilizing collective bargaining relationships is not promoted but inhibited.

---

[4] The Board's simple notation, in its supplemental decision, that its refusal to consider this factor is consistent with *recent* Board decisions (citing *Philadelphia Newspapers, Inc.*, 238 NLRB 835 (1978) and *The Virginian Pilot/Ledger Star, Capital Division of Landmark Communications, Inc.*, 241 NLRB No. 81 (1979)) does little to rebut the charge here that the Board had engaged in erratic and unreasoned decision making. In addition, the cases cited by the Board provide little solace to the district managers whose collective bargaining relationship has still been destroyed because of the Board's unexplained refusal to consider the Company's prior characterization of the carrier's employment status. As the dates of these decisions indicate, the Board's change in posture occurred substantially later than the formation of the district manager's collective bargaining agreement with the Company. At the time of that formation Board law still held that carriers were not employees.

B. Because The Rulings Below Threaten Industrial Stability By Permitting Virtually Any Newspaper Whose Circulation District Managers Have Union Representation To Put At Risk Or Hold Hostage The Collective Bargaining Relationship, Special And Important Reasons Warrant Grant Of The Writ In This Case.

It is a basic objective of the Act to encourage and promote stable collective bargaining relationships as an alternative to industrial strife. Employee status is the foundation of the collective bargaining relationship as well as of many of the Act's protections. Supervisors have no right to collective bargaining representation. Section 14(a) of the Act, 29 U.S.C. §164(a), merely permits collective bargaining on their behalf if the employer is willing. No employer can be compelled to establish or continue the relationship.[9]

To permit an employer with an established bargaining relationship to refuse to bargain by challenging employee status is surely as disruptive of industrial stability as permitting an employer to refuse to negotiate by questioning the union's majority status.[10] Indeed, it is far worse since only protracted litigation rather than a prompt election can resolve it. When employee status under an established bargaining relationship is challenged, pension and other rights under plans jointly administered by unions and employers may be irreparably lost along with the collective bargaining unit.[11] Even an employer's

---

[9] *NLRB v. News Syndicate Co.*, 365 U.S. 695 (1961); *Beasley v. Food Fair, Inc.*, 416 U.S. 653 (1974).

[10] *See Ray Brooks v. NLRB*, 348 U.S. 96, 104 (1954); and *United States Gypsum Co.*, 157 NLRB 652 (1966).

[11] Federal law does not require that pension rights vest until participants have ten years of service. Employee Retirement Income Security Act, 29 U.S.C. §1053. All district managers had less than ten years of participation in the jointly administered plan here because it had first been negotiated less than ten years before the events in question.

threat to raise the issue before the Board and argue against employee status for district managers will have an important and unsettling impact on negotiations. Thus the disruptive effects of the rulings below on industrial stability are several and serious.

The threat to industrial peace presented by the decisions below is extensive as well. Petitioner represents hundreds of district managers at both of the major Detroit area daily newspapers. Other unions represent district manager classifications at newspapers in other cities. The rulings below threaten the existence of most of those units because they accept an *ad hoc* claim that carriers long treated as independent contractors are actually employees and hence that those who recruit and oversee them are supervisors without statutory collective bargaining rights. It is no answer to say employees and independent contractors are well-established and legally discrete categories. Since the newspaper has control over carrier *modus operandi* as well as the presentation of the most probative overall evidence concerning it, and the narrow right to control test as applied by the Board calls for the delicate weighing of many variables, the employer is in a position to tilt the balance of factors one way or the other, and even one day to another, as its interest may dictate. Unless the employer is held to or substantial weight given its prior characterization of the carrier relationship, a newspaper can contend today that carriers are employees to defeat or destroy district managers bargaining rights, but tomorrow, if a carrier dies in an accident, breaks a window throwing a paper, or signs a union authorization card, argue that they are independent contractors.

Unitl the rulings below, reviewing courts and the Board itself have refused to permit newspapers to play fast and loose with their own workers in this fashion, and in particular where the effect of the ploy is to destroy an established collective bargaining unit. Legitimate management prerogatives do not warrant the decisions below. No intervening operational changes were

shown, or even claimed, to justify the Company's contention that the carrier relationship it had created and controlled and that it had held out to the public, to its own employees and to their union to be an independent contractorship, was sham. Because the source of this error and the substantial mischief which it permits is an apparent misreading of this Court's holding in *United Insurance,* the decisions below should now be reviewed here.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

GERRY M. MILLER
788 North Jefferson Street
Milwaukee, Wisconsin 53202
414/271-4500
Attorney for Petitioner

Of Counsel:
LARRY R. STEFFES
Goldberg, Previant, Uelmen, Gratz,
Miller & Brueggeman, s.c.
788 North Jefferson Street
Box 92099
Milwaukee, Wisconsin 53202
414/271-4500

84- 989

No.

Supreme Court, U.S.
FILED
DEC 17 1984
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NEWSPAPER DRIVERS AND HANDLERS, LOCAL NO. 372,
a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

OAKLAND PRESS COMPANY,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

GERRY M. MILLER
788 North Jefferson Street
Milwaukee, Wisconsin 53202
414/271-4500
Attorney for Petitioner

Of Counsel:
LARRY R. STEFFES
GOLDBERG, PREVIANT, UELMEN,
GRATZ, MILLER & BRUEGGEMAN, S.C.
788 North Jefferson Street
Box 92099
Milwaukee, Wisconsin 53202
414/271-4500

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

6815

TABLE OF CONTENTS

		Page
A:	Final Decision of the U.S. Court of Appeals: *Newspaper Drivers and Handlers Local No. 372 v. NLRB*, 735 F.2d 969 (6th Cir. 1984)	A-1
B:	First Decision of the U.S. Court of Appeals: *Oakland Press Co. v. NLRB*, 606 F.2d 689 (6th Cir. 1979)	A-6
C:	Second Decision of the U.S. Court of Appeals: *Newspaper Drivers and Handlers Local Union No. 372 v. NLRB*, 682 F.2d 116 (6th Cir. 1982)	A-15
D:	Decision and Order of the NLRB: *The Oakland Press Co.*, 229 NLRB 476 (1977)	A-20
E:	Decision and Recommended Order of the Administrative Law Judge	A-22
F:	Supplemental Decision and Order of the NLRB: *The Oakland Press Co.*, 249 NLRB 1081 (1980) ...	A-40
G:	Second Supplemental Decision of the NLRB: *The Oakland Press Co.*, 266 NLRB 107 (1983)	A-51
H:	Judgment of the U.S. Court of Appeals, May 31, 1984	A-56
I:	Order of the U. S. Court of Appeals Denying Petition for Rehearing, August 15, 1984	A-58
J:	Order of the Supreme Court of the United States Extending Time to File Petition for Writ of Certiorari, November 2, 1984	A-59
K:	Federal Statutes Involved	A-60

L: Relevant Provisions of the Collective Bargaining Agreement Between Newspaper Drivers and Handlers, Local 372 and The Oakland Press Company..... A-63

M: Excerpt from Transcript of Proceedings before Administrative Law Judge A-65

APPENDIX A

Newspaper Drivers & Handlers Local #372,
A/W International Brotherhood Of Teamsters,
Chauffeurs, Warehousemen & Helpers Of America,
Petitioner,

v.

National Labor Relations Board,
Respondent,

The Oakland Press Company,
Intervenor.

No. 83-5311

United States Court of Appeals,
Sixth Circuit.

Argued April 13, 1984.

Decided May 31, 1984.

Gerry M. Miller (argued), Goldberg, Previant, Uelmen, Gratz, Miller & Brueggeman, Milwaukee, Wis., for petitioner.

Elliott Moore, Deputy Associate Gen. Counsel, Rhonda G. Williford (argued), N.L.R.B., for respondent.

L. Michael Zinser (argued), King, Ballow & Little, Nashville, Tenn., for intervenor.

Before MARTIN and KRUPANSKY, Circuit Judges, and REED, District Judge.*

---

* Honorable Scott Reed, United States District Judge for the Eastern District of Kentucky, sitting by designation.

BOYCE F. MARTIN, Jr., Circuit Judge.

The only remaining issue in this case, which has been before this court on two previous occasions, *see* 606 F.2d 689 (6th Cir.1979), and 682 F.2d 116 (6th Cir.1982), is whether an employer can be equitably estopped from claiming that workers previously recognized as "employees" under section 2(3) of the National Labor Relations Act are actually supervisors and thus not protected by the Act.

Newspaper Drivers and Handlers, Local Union No. 372 represents 15 district managers who work for the *Oakland Press,* a suburban Detroit newspaper. These district managers are responsible for overseeing the paper's delivery operations. Each manager supervises about 90 newspaper carriers who are responsible for the actual delivery of the paper to a subscriber's doorstep. The average carrier is 12 years old, has about 50 subscribers, earns about two dollars a day, and lasts about 6-12 months on the job. About 35 of the 1,250 carriers are adults who cover suburban car routes.

Beginning in 1970, the newspaper recognized the district managers as employees under section 2(3) of the Act. At that time, the paper characterized the carriers as independent contractors for the district managers. The paper recognized the union as the bargaining agent for the district managers after it won a representation election in 1971. However, in 1976, when the current bargaining agreement was about to expire, the newspaper reversed its position and refused to bargain with the union, claiming that the district managers were actually supervisors and, as such, not entitled to protection under the Act. *See* 29 U.S.C. § 164(a). The union then filed an unfair labor practice charge with the Board.

In the original proceedings before the Board, the administrative law judge found that the newspaper carriers were not really independent contractors but were not employees of the newspaper either. Because the carriers were not employees,

it followed that the district managers were not supervisors and so could form a bargaining unit that the newspaper must recognize. The Board adopted the administrative law judge's findings *in toto*. 229 N.L.R.B. 77 (1977). On appeal, this Court remanded the case to the Board for an express determination on the status of the newspaper carriers. *Oakland Press Co. v. NLRB*, 606 F.2d 689 (6th Cir.1979).

On remand, the Board reversed itself and its longstanding policy, *see Newsday, Inc.*, 171 N.L.R.B. 1451 (1968), and found that the newspaper carriers were employees within the meaning of section 2(3) of the Act and, therefore, that the district managers were supervisors not entitled to the protections of the Act. 249 N.L.R.B. 1081 (1980). On appeal to this Court, we affirmed the Board's determination that the carriers were employees and the managers supervisors,** but remanded once again, this time on the narrow issue of whether the newspaper was equitably estopped from claiming that the district managers were supervisors. *Newpaper Drivers & Handlers, Local Union No. 372 v. NLRB*, 682 F.2d 116 (6th Cir.1982). On remand, the Board found that equitable estoppel did not lie in this case because invoking the doctrine would contravene the basic policies of the Act. Moreover, even assuming that estoppel could lie, the Board found that the elements necessary to activate the doctrine were not present in this case. 266 N.L.R.B. 26 (1983). The union now petitions for review of this order and the Board cross-applies for its enforcement.

** The law of the case requires that we accept the Board's determination that the newspaper carriers are employees. *See, e.g., Hawkes v. Internal Revenue Service*, 507 F.2d 481, 481 n. 1 (6th Cir.1974). Nonetheless, we feel compelled to note our disagreement with this decision. It is difficult to imagine that 12-year-old children, working five hours a week for two dollars an hour, are the type of people to whom Congress intended to extend the protections of the National Labor Relations Act. It is even more difficult to imagine that such a group would, or even should, ever organize. To us, these

[1, 2] "Congress intended recognition of supervisors by employers for bargaining purposes [to] be completely voluntary." *District 2, Marine Engineers Beneficial Ass'n v. Amoco Oil,* 554 F.2d 774, 778 n. 5 (6th Cir.1977). *See also Hanna Mining Co. v. District 2, Marine Engineers Beneficial Ass'n,* 382 U.S. 181, 189, 86 S.Ct. 327, 331, 15 L.Ed.2d 254 (1965). The purpose of this rule ws to ensure "that no one, whether employer or employee, need have as his agent [i.e., supervisor] one who is obligated to those on the other side, or one whom, for any reason, he does not trust." H.Rep. No. 245, 80th Cong., 1st Sess. 17 (1947). This being the case, the only question for us is whether an employer's freedom of choice in this matter can be curtailed by prior conduct, *i.e.,* by the doctrine of equitable estoppel. The Board argues that it cannot. We must agree. In earlier cases, the Board has recognized the right of a company to challenge "employee status" of workers who have long been a part of recognized bargaining units, even when the duties of those workers remain unchanged. *See, e.g., The Washington Post Co.,* 254 N.L.R.B. 168, 168-69 (1981); *Brotherhood of Locomotive Firemen & Engineers,* 145 N.L.R.B. 1521, 1525 n. 10 (1964). Under these decisions, prior conduct of an employer is significant evidence as to the proper classification of employees, but it is not determinative. *Washington Post, supra,* at 169. While these prior decisions of the Board are not controlling on us, they do lend considerable support to the Board's position.

---

children are much like the sheltered workshop people in *Key Opportunities, Inc.,* 265 N.L.R.B. No. 178 (1982), and the part-time student janitors in *San Francisco Art Institute,* 226 N.L.R.B. 1251 (1971), whom the Board has already determined are not employees for purposes of the Act. The only practical effect of this decision is to exclude from the Act a group of employees whom Congress surely intended would be covered by it.

Moreover, applying collateral estoppel in this area would frustrate a fundamental purpose of the Act, namely not requiring employers to bargain collectively with workers also connected with management. *See* 29 U.S.C. § 164(a) ("no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law ... relating to collective bargaining"). Such frustration of purpose cannot be allowed. In the related doctrine of waiver, the Supreme Court has recognized that waiver is not possible when it would result in a situation "inconsistent with the purposes of the statute at issue." *See Metropolitan Edison Co. v. NLRB,* ____ U.S. ____, ____ n. 10, 103 S.Ct. 1467, 1471 n. 10, 75 L.Ed.2d 387, 400 n. 10 (1983). So it should be with estoppel. Accordingly, we find that equitable estoppel cannot be invoked to prevent a company from challenging the "employee status" of workers it had previously recognized as employees.

The decision of the Board is enforced.

APPENDIX B

The Oakland Press Company, a Subsidiary of Capital Cities Communications, Inc.,
Petitioner,

v.

National Labor Relations Board,
Respondent,

Newspaper Drivers & Handlers' Local No. 372, etc.,
Intervenor.

No. 77-1320.

United States Court of Appeals,
Sixth Circuit.

Argued June 8, 1979.

Decided Oct. 4, 1979.

L. Michael Zinser, King & Ballow, Nashville, Tenn., for petitioner.

Elliott Moore, Anton Hazzar, Deputy Associate Gen. Counsel, N. L. R. B., Washington, D. C., Bernard Gottfried, Director, Region 7, N. L. R. B., Detroit, Mich., for respondent.

Before LIVELY, Circuit Judge, CECIL, Senior Circuit Judge, and BROWN, District Judge.*

---

* The Honorable Bailey Brown, Chief Judge, United States District Court for the Western District of Tennessee, sitting by designation.

CECIL, Senior Circuit Judge.

The Oakland Press Co., (Oakland), a subsidiary of Capital Communications, Inc., Petitioner, engaged in the business of publishing and printing a newspaper of general circulation, petitions this Court to review an order of the National Labor Relations Board (Board), Respondent, finding that Oakland had violated Section 8(a)(5) of the National Labor Relations Act (29 U.S.C. Sec. 151 et seq.) by refusing to bargain with the Union for new contracts. The Board cross petitions for enforcement of its order.

Two units of employees of Oakland, all Circulation Department Truck Drivers and City Dealer Drivers, hereafter Truck Drivers, together with all Circulation Department District Managers, hereafter District Managers, constitute the bargaining units involved in the action. The Labor Organization with which Oakland was charged with conducting negotiations is Local 372, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Union).

In 1973 Oakland and the Union entered into separate contracts covering the two bargaining units, each of which provided in part as follows:

> "This Agreement shall be in full force and effect from June 1, 1973 to andincluding May 31, 1976, and shall continue in full force and effect from year to the year thereafter, unless written notice of desire to cancel or to terminate is served by either party upon the other at least sixty (60) days prior to the date of expiration."

On March 15, 1976, Elton L. Schade, Secretary-Treasurer of the Union, wrote identical letters to Oakland which stated in part:

> "You are hereby notified that Newspaper Drivers and Handlers Local 372, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen

and Helpers of America, desires to continue its current collective bargaining agreement with your firm, but also to negotiate certain changes or revisions in its provisions, including those set forth in memorandum agreements and other supplements thereto to take effect during the contract period commencing June 1, 1976.

"Local 372 offers to meet and confer with your representatives for the purpose of negotiating said changes or revisions at a mutually convenient date, time or place.

"The changes or revisions to be negotiated will be sent to you at a later date."

Robert Ballow, labor counsel for Oakland, received this letter some time after April first. He concluded that the Union had not followed the language of the termination clauses and, therefore, the contracts would automatically be renewed for a period of one year and were not now negotiable. The Administrative Law Judge made a finding of fact and concluded that the language of the letters was technically sufficient for a termination of the contracts in question and that they were subject to negotiation. The Board affirmed this finding.

Thus, we are confronted at the outset with the issue of whether these 1973 contracts were effectively terminated. This issue properly stated for our consideration is:

WHETHER SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COLLECTIVE BARGAINING AGREEMENTS COVERING THE TRUCK DRIVERS AND DISTRICT MANAGERS WERE EFFECTIVELY TERMINATED BY THE UNION, THEREBY REQUIRING PETITIONER TO NEGOTIATE WITH THE UNION FOR NEW AGREEMENTS CONCERNING ANY ISSUES COVERED BY THE AGREEMENTS INVOLVED.

It is provided in 29 U.S.C., Sec. 160(f) that

> "• • • the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall • • • be conclusive." See also *Universal Camera Corp. v. N. L. R. B.*, 340 U.S. 474, 488, 71 S.Ct. 456, 95 L.Ed. 456 (1951).

We summarize the evidence before the Administrative law Judge:

Counsel for the petitioner argues that since the letters of the Union did not specifically use the words "cancel" or "terminate" they did not comply with the language of the contracts for termination. In addition, he argues that the Union's letters unambiguously assert its desire to continue the agreements in force and negotiate only certain provisions of them. This, counsel claims, was the intention of the Union for the reason that there were provisions of the agreements which they did not want to open up to renegotiation, such as dues checkoff and picket line protecting clauses.

On one occasion, counsel for petitioner asked Schade, counsel for the Union, if he intended his letters of March 15, 1976 to terminate the contracts and he responded that he did not.

The Administrative Law Judge relies largely for the basis of his finding on the history of the negotiations between the parties.

The first collective bargaining agreement between these parties was entered into in 1972, effective through May 31, 1973. Like the agreements now before us, it provided for automatic renewal "unless written notice of desire to cancel or terminate (was) served by either party upon the other at least sixty (60) days prior to the date of termination." On March 8 and 9, 1973, the Union informed the petitioner that it desired

> "* * * to continue its current collective bargaining agreement with your firm, but also to negotiate certain changes or revisions in its provisions, including those set forth in schedules, memorandum agreements thereto, to take effect during the contract period commencing June 1, 1973."

The language of this letter is virtually identical to language of the Union letters in the case now before us. It was considered to terminate the agreement of 1972. The Law Judge considered that if that language terminated the contracts then, it was sufficient to terminate them now. The parties negotiated the collective bargaining agreements, now before us, on August 17, 1973, to be effective June 1, 1973 to May 31, 1976.

The record indicates that the parties arranged negotiating sessions and, in fact, met on several occasions in April, May and June 1976. At the hearing before the Administrative Law Judge, Robert Ballow, petitioner's counsel, testified, in effect, that, although he felt that the contract had not been terminated, he, nevertheless, wanted to allow the Union to construct a record during these sessions. As we said above, Ballow felt that the Union's letters constituted an attempt to negotiate changes in the contract but not terminate the contract.

Other evidence considered by the Law Judge consisted of letters of April 11th and 19th from Schade, Secretary-Treasurer of the Union, transmitting the Union's proposals. In each letter it was stated,

> "Enclosed please find (2) copies of the Union's proposal to amend the current District Managers contract which *expires on May 31, 1976.*" (Emphasis added)

The Law Judge found that the argument of counsel for petitioner

> "* * * does not take into consideration the past history of bargaining between these parties or other extrinsic evidence which clearly slows (sic) the Union's position and

> which reasonably puts the Respondent (employer) on notice concerning it."

He found further,

> "The point here is that the past practice was to treat the charging parties' letter as a letter to re-open the contract for negotiation of all substantive terms and absent agreement prior to May 31, the contract would terminate as of that date. However, the Union would consider entering into extension agreements."

We conclude that, while the record is susceptible to differing conclusions, "* * * substantial evidence on the record considered as a whole" supports the findings of the Administrative Law Judge which were adopted by the Board.

Accordingly, we enforce the order of the Board requiring Oakland to bargain with the Union for a contract with Truck Drivers. By Oakland's refusal to so bargain, it violated Section 8(a)(5) of the National Labor Relations Act.

We consider further the issue of whether District Managers were supervisors in the employ of Oakland. The employer claims that the District Managers are supervisors of the paper carriers and, thus, are not an appropriate unit for the negotiation of a collective bargaining agreement.

> "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U.S.C. Sec. 152(11) "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization,

> but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining." 29 U.S.C. Sec. 164(a).

The record clearly indicates that the District Managers, working as salaried individuals in the Oakland offices, are responsible for the sale, promotion and delivery of newspapers within a given geographic area. To exercise these responsiblities, the record also clearly indicates that the District Managers have the authority to hire the newspaper carriers, assign them to specific routes, direct them with respect to the manner of delivering and collecting charges for the newspapers, as well as the authority to fire the carriers.

The determinative factor with respect to this issue is whether the paper carriers are employees of Oakland or are independent contractors. The definition of employee as contained in the statute is:

> "The term 'employee' shall include any employee * * * unless this subchapter explicitly states otherwise, * * * but shall not include * * * any individual having the status of an independent contractor, or any individual employed as a supervisor * * *" 29 U.S.C. Sec. 152(3)

The Administrative Law Judge found, and the record indicates that,

> "* * * most of the 1,250 paper carriers are children of approximately 12 years of age who have rather small routes and who deliver the newspaper on their skateboards, bicycles, by walking or on horseback. (There are about 35 motor routes handled by adults.) They typically have about 50 subscribers on their routes and typically make about $2.00 a day from this work—4 cents per paper. (The motor carriers have 175-200 subscribers and are paid 6

> cents per paper, 2 cents of which is to cover automobile expenses. Thus the adults make $7 to $8 per day, plus expenses.) They do not own their routes and indeed if they fail to deliver their papers or approximately collect for them, they are summarily terminated. "The evidence also shows that typically these young people maintain their routes for a period of 6 months to a year. (The adults tend to keep their routes somewhat longer.)

Admittedly, these paper carriers are under the direction and control of the District Managers. However, the Administrative Law judge, considering the evidence as he viewed it, concluded that,

> "* * * the District Managers are employees within the meaning of Section 2(3) of the Act and are not supervisors in that they do not exercise supervisory control over other employees of the employer."

Accordingly, he found that they were an appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

In so ruling, the Administrative Law Judge specifically refrained from deciding whether the paper carriers were actually independent contractors. Though he noted that the argument of the parties had been directed "to the question of whether or not (the paper carriers) are independent contractors," the Judge stated in his decision "that is not the real issue. The real issue is whether these individuals are employees." The Judge stated that he did not reach the question of whether the paper boys were independent contractors. With respect to this issue, the judge ruled that "as a matter of policy" the carriers should not be treated as employees.

The Board adopted the findings and conclusions of the Administrative Law Judge as its own.

We cannot accept the finding that, as a matter of policy, they are not employees. Whose policy? They are entitled to be definitely classified under the statute. Either they are legally employees or, according to law, they are not employees.

We remand the case to the Board for determination of the legal status of these paper boys with reference to their employment relationship to Oakland.

APPENDIX C

Newspaper Drivers And Handlers Local Union No. 372, Affiliated With International Brotherhood Of Teamsters, Chauffeurs, Warehousemen And Helpers Of America,

Petitioner,

v.

National Labor Relations Board,

Respondent,

and

The Oakland Press Company, a Subsidiary Of Capital Cities Communications, Inc.,

Intervenor.

No. 81-1023.

United States Court of Appeals,
Sixth Circuit.

Argued April 12, 1982.

Decided June 29, 1982.

Rehearing Denied Aug. 23, 1982.

Gerry M. Miller, Goldberg, Previant, Uelmen, Gratz, Miller, Levy & Brueggeman, Milwaukee, Wis., for petitioner.

Elliott Moore, Deputy Associate Gen. Counsel, Jolane Findley, N.L.R.B., Washington, D.C., L. Michael Zinser, Nashville, Tenn., for respondent.

Robert L. Ballow, King & Ballow, Daniel C. Kaufman, L. Michael Zinser, Nashville, Tenn., for intervenor.

Before EDWARDS, Chief Judge, MARTIN, Circuit Judge, and TUTTLE,* Senior Circuit Judge.

PER CURIAM.

This is the second time this case has been heard in this court. After the first hearing, it was remanded by a different panel for a determination of whether or not the newspaper carriers involved were as a matter of fact independent contractors or employees.

On review by the Board and by a divided two-to-one vote, the Board found, contrary to its long-standing previous policy, (*see Newsday, Inc.* 171 N.L.R.B. 1456 (1968)) that newspaper carriers were employees and hence that the district managers (whose status is actually at issue here) were supervisors so as to defeat their bargaining rights. The logic of this reversal appears to be entirely related to a change in composition of the Board, since the following facts relied upon by the Board in its decision were all available at the time of the *Newsday* decision.

The statutory review powers of this court are limited to determining as to the Board's fact findings only whether or not they are supported by substantial evidence on the whole record. Under that standard, there is no question but that the present fact-finding does have substantial support, as exemplified in the Board's recital of facts below:

> Certain factors point toward the independent contractor status of the carriers. Thus, (1) carriers are not on Respondent's payroll and are required to sign an agreement which gives them "the exclusive right" to service all subscribers on their particular route. (2) Their income, which is not in the form of wages or salaries, usually constitutes the dif-

---

* Honorable Elbert P. Tuttle, Senior Judge, U.S. Court of Appeals for the Eleventh Circuit, sitting by designation.

ference between the price of each copy and the subscription rate. (3) Respondent does not withhold social security and income taxes on behalf of the carriers. (4) Respondent does not provide workmen's compensation for the carriers. (5) Respondent does not grant carriers any fringe benefits except for the option as to accident insurance. (6) Carriers are given an opportunity to enhance their income and are eligible for prizes and awards by obtaining new subscribers. (7) Carriers assume the risk of loss when subscribers on their route are delinquent and Respondent bills carriers if they fail to deliver any copies they have ordered. (8) Carriers who desire to have shoulder or saddle bags must purchase them unless their predecessor provides them with used bags without charge.

However, the foregoing factors are clearly outweighed by the following factors which, notwithstanding the characterization of the carriers in the route agreement as "independent," demonstrate their employees status:

(1) Respondent establishes the wholesale and retail price of the newspaper, thereby controlling to a great extent the carriers' income. (2) The opportunity for additional income through the carriers' efforts in securing new subscribers is limited because (a) the carriers must, with the exception of their own parents and immediate neighbors, deliver newspapers only within their assigned route and (b) the carriers are prohibited from delivering any other newspapers or printed material without authorization by Respondent. (3) Respondent has the unilateral right to change the size of the route. (4) Carriers are subject to transfer by the district managers. (5) The carriers have no proprietary interest in their route and are not required to post a bond or pay for the route or the subscriber list. (6) Carriers do not have to pay Respondent for copies which are damaged or lost for any reason. (7) Although carriers bear the loss in the event of a subscriber's delinquency,

> their risk is minimized by the district manager's assistance in seeking to collect from such subscribers. (8) Respondent finances promotional campaigns. (9) District managers have substantial control over the carriers by training newly hired carriers and substitutes, instructing them as to their duties, checking on and evaluating the carriers' performance, assigning them to new routes, resolving the complaints of subscribers and the grievances of carriers, and terminating carriers when their work is unsatisfactory.
>
> In view of the substantial control by the district managers over the carriers, the absence of the proprietary interest on the part of the carriers, their insulation from most losses, and the limited opportunity for significantly increasing their income, we now reverse our earlier finding and conclude in the light of the Board's more recent Decisions that the carriers are employees within the meaning of the Act.[10]

All this to the contrary notwithstanding, the union argues that the company should be equitably estopped from asserting a position completely inconsistent with its past conduct and representations.

Review of the Board's order indicates that the Board considered that this court's remand had precluded its review of this contention. We do not agree that this is a correct interpretaion of this court's remand opinion. There is no express limitation therein, and we find no reason to imply one. For the limited purpose of determination of the equitable estoppel issue, the case is remanded to the National Labor Relations Board.

---

[10] See *Philadelphia Newspapers, Inc.*, 238 NLRB No. 110 (1978). See also *The Virginian-Pilot/Ledger Star, Capital Division of Landmark Communications, Inc.*, 241 NLRB No. 81 (1979), wherein the carriers were found to be employees despite the employer's past characterization of them as independent contractors.

BOYCE F. MARTIN, Jr., Circuit Judge, dissenting.

I respectfully dissent on the basis that I do not feel that there is any evidence whatsoever that equitable estoppel may be claimed by the petitioners. I would enforce the order of the Board.

APPENDIX D

The Oakland Press Co., a Subsidiary of Capital Cities Communications, Inc. ***and*** **Local 372, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers Of America.** Case 7-CA-13059

May 6, 1977

DECISION AND ORDER

By Chairman Fanning and Members Pennello and Walther

On January 5, 1977, Administrative Law Judge James L. Rose issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board had delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs[1] and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge[2] and to adopt his recommended Order.

---

[1] Respondent's request for oral argument is denied as the record, exceptions, and briefs adequately present the issues and positions of the parties.

[2] The Administrative Law Judge properly found, *inter alia,* that the Union's March 15, 1976, letters of notification to Respondent terminated their collective-bargaining agreements for the two employee units herein as of May 31, 1976. However, Respondent, in a subsequent motion to reopen the record, opposed by the Charging Party, contends that a March 11, 1977, letter from the Union to a new employee, which refers to the union-security provision in "the existing

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, The Oakland Press Co., a subsidiary of Capital Cities Communications, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

---

contract," constitutes a clear admission by the Union that it did not terminate the collective-bargaining agreements. As the evidence adduced at the hearing before the Administrative Law Judge is sufficient to determine the contract termination issue, we find it unnecessary to consider the proffered evidence and we therefore deny Respondent's motion.

APPENDIX E

DECISION

Statement of the Case

James L. Rose, Administrative Law Judge: This matter was heard before me on October 18 and 19, 1976, at Detroit, Michigan, upon the General Counsel's complaint which alleged that the Respondent, The Oakland Press Co., a Subsidiary of Capital Cities Communications, Inc.,[1] had violated Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §151, *et seq.*, by refusing to bargain with the Union for new contracts.

Involved in this case are two bargaining units of the Respondent's employees, both of which are represented by the Union. Collective-bargaining agreements covering both units were effective from May 31, 1973, to June 1, 1976. In each there was a termination clause the effect which was that in the event neither party give notice to "terminate or cancel" the respective contract 60 days prior to the May 31, expiration date, the contract would remain in full force in effect for an additional year.

On March 15, 1976, the union business agent sent identical letters to the Company by which it sought to "re-open" each contract and to negotiate certain changes.

The Company takes the position that these letters did not comply with the termination clause of the contracts and accordingly, each contract was automatically renewed as of June 1, 1976. Thus the Respondent states that it will bargain with the Union concerning any matters not covered by either contract, but it is not obligated to bargain concerning modification of any term.

---

[1] The name of the Respondent appears as amended pursuant to the Respondent's posthearing motion, which is thereby granted.

The General Counsel alleges that by refusing to bargain with the Union concerning mandatory subjects, specifically including proposed amendments to wages, hours, and terms and conditions of employment, the Company has thereby violated Section 8(a)(5) of the Act.

An additional issue in this matter concerns the unit of district managers, all of whom the Respondent claims are supervisors, inasmuch as they are in charge of the paper carriers. The General Counsel contends that the paper carriers are independent contractors. Thus the district managers do not supervise employees of the employer and are therefore not supervisors within the meaning of Section 2(11) of the Act.

All parties were represented by counsel and were given the opportunity to examine and cross-examine witnesses. Upon the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I hereby make the following:

FINDINGS OF FACT

I. BUSINESS OF THE RESPONDENT

The Respondent is a Michigan corporation, engaged in the business of publishing and printing a newspaper of general circulation. During the calendar year 1975, a representative period, the Respondent had gross revenues in excess of $1 million, advertised various nationally sold products revenues from which exceeded $500,000, and purchased goods, products, and materials valued in excess of $50,000 directly from points outside the State of Michigan.

The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Local 372, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, it is admitted by

the Respondent to be, and I find, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE BARGAINING UNITS

Although the Respondent did not admit the appropriateness of the unit description for the circulation department truckdrivers and city truckdrivers, there is no evidence in the record that this is not an appropriate bargaining unit.

Since at least 1972, the Respondent has in fact recognized the Union as the bargaining representative for such a unit. The Respondent and the Union have negotiated collective-bargaining agreements covering the unit of circulation department truckdrivers and so far as can be determined from the record, the Respondent continues to recognize the Union as the representative of these employees. Accordingly, I conclude that the following is a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All Circulation Department Truckdrivers and City Dealer Drivers of the Respondent, excluding all other employees, guards and supervisors as defined in the Act.

As indicated above, the Respondent denies the appropriateness of the unit of district managers on grounds that these individuals are supervisors within the meaning of the Act. Thus the Respondent argues that it may voluntarily bargain with the representative of such employees, but it need not do so and failure to do so is not violative of the Act.

The question of whether the district managers constitute an appropriate bargaining unit depends on the status of some 1,250 individuals who deliver newspapers for the Respondent.

The Respondent contends that these 1,250 individuals are employees within the meaning of Section 2(3) and since the district managers have the authority to hire them, fire them, direct them, and the like they are necessarily supervisors within

the meaning of Section 2(11) of the Act. The General Counsel, on the other hand, contends that the paper carriers are independent contractors and therefore the district managers are not supervisors of employees. Without necessarily concluding that the carriers are independent contractors, I do agree that they are not employees. And whatever supervisory authority the district managers may exercise, it is not supervision of employees. Therefore they are not supervisors within the meaning of the Act. *Newsday, Inc.,* 171 NLRB 1456 (1968).

As to the status of the paper carriers, the evidence and argument is directed principally to the question of whether or not they are independent contractors. Of course if they are, then they are not employees. But that is not the real issue. The real issue is whether these individuals are employees. I conclude they are not, without deciding whether they are actually independent contractors.

The Respondent sought to show that it maintains control over the manner and means by which the carriers deliver the papers, and the Respondent presented evidence of a number of indicators found by the Board to establish such "right of control." On the other hand, the General Counsel sought to establish that the Respondent controls only the result—delivery of the newspapers to specified customers by a certain time each day. And the General Counsel presented evidence of some indicators found by the Board to demonstrate lack of control over the manner and means.

In brief, the material facts show that most of the 1,250 paper carriers are children of approximately 12 years of age who have rather small routes and who deliver the newspaper on their skateboards, bicycles, by walking, or on horseback. (There are about 35 motor routes handled by adults.) They typically have about 50 subscribers on their routes and typically make about $2 a day from this work—4 cents per paper. (The motor carriers have 175-200 subscribers and are paid 6 cents per paper, 2 cents of which is to cover automobile expenses. Thus the adults make

$7 to $8 per day, plus expenses.) They do not own their routes and indeed if they fail to deliver the papers or appropriately collect for them, they are summarily terminated.

The evidence also shows that typically these young people maintain their routes for a period of 6 months to a year. (The adults tend to keep their routes somewhat longer.)

It is difficult to conceive that subteenage children who carry newspapers for a period of 6 months to a year for which they are paid in the range of $2 a day are entrepreneurs in the traditional sense of an independent contractor. This, however, does not necessarily mean that they should be considered employees. Their employment, if any, is very minimal, amounting to only a few hours a week and lasts, as indicated, typically less than a year. The question here is not so much whether a 12-year-old who delivers newspapers 1 hour a day on a skateboard is an entrepreneur, but whether, as a matter of policy, they (or the adults) should be treated as employees.

Though the factors cited by the parties do have some bearing on whether one is found to be an independent contractor or not, there are additional, and important considerations here.

Specifically, the Respondent has always treated the carriers as nonemployees, and still does. The Respondent does not consider them employees for purposes of income tax withholdings, the Federal Insurance Contributions Act, unemployment compensation, or workmen's compensation.

Unlike other employees, the carriers sign a "lease" agreement and post a $10 bond. The Respondent has clothed them with indicia of independent contractors and in 1970 agreed that they were nonemployees when the district managers unit was organized.

From the record as a whole, it is clear that the Respondent's contention that these carriers are employees is taken for purposes of this case only.

Newsday, Inc., supra, was also a case involving whether district managers who supervised carriers were employees and, as here, this hinged on the status of the carriers. The carriers' duties, their ages, pay, method of delivery were essentially identical to the facts here. The employer, as here, had always considered carriers to be "independent contractors." The Board found that the carriers not to be employees and hence the district managers were not supervisors. The Board therefore found appropriate the petitioned-for unit of district managers. As to the foot carriers, *Newsday* is on all fours with the instant case. The motor carriers' situation here is not sufficiently different to change the result.

I therefore conclude that the district managers are employees within the meaning of Section 2(3) of the Act and are not supervisors in that they do not exercise supervisory control over other employees of the employer. The following is a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All Circulation Department District Managers of the Respondent, excluding all other employees, guards and supervisors as defined in the Act.

IV. THE UNFAIR LABOR PRACTICE

The 1973-76 contracts covering the two bargaining units in question have identical "termination" articles which read, in material part:

> This Agreement shall be in full force and effect from June 1, 1973, to and including May 31, 1976, and shall continue in full force and effect from year to the year thereafter, unless written notice of desire to cancel or to terminate the Agreement is served by either party upon the other at least sixty (60) days prior to the date of expiration.

On March 15, 1976, Elton L. Schade, secretary-treasurer of the Union, wrote identical letters to the Respondent which stated, in material part:

> You are hereby notified that Newspaper Drivers and Handlers Local 372, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, desires to continue its current collective bargaining agreement with your firm, but also to negotiate certain changes or revisions in its provisions, including those set forth in memorandum agreements and other supplements thereto to take affect during the contract period commencing June 1, 1976.
>
> Local 372 offers to meet and confer with your representatives for the purpose of negotiating said changes or revisions at a mutually convenient date, time and place.
>
> The changes or revisions to be negotiated will be sent to you at a later date.

The Respondent's new labor counsel, Robert Ballow, received this letter sometime on or after April 1. He concluded that the Union had not followed the language of the termination clauses of the contractors and therefore did not, by sending this letter, appropriately terminate either contract. Ballow concluded that the two contracts would automatically be renewed for a period of 1 year.

Negotiation sessions were set up and the parties in fact met on several occasions in April, May, and June.[2] A fair summary of Ballow's testimony, and that of Schade, is that during these negotiation sessions Ballow undertook to construct a record. In effect he stated that, even though the contract was not appropriately terminated, he nevertheless wanted to give the Union an opportunity to do so but that Schade refused.

---

[2] The contract requires bargaining to commence at least 45 days before the May 31 expiration date. Though mentioned in its brief, the Respondent apparently does not contend that violation of this language excused its refusal to bargain. The first session of April 21 (less than 45 days from May 31) was arranged on April 6 to the mutual satisfaction of both parties.

Thus Ballow argues that the Union's letter was an attempts on the part of the Union to negotiate changes in the contract but at the same time not have the contract terminate, because were the contract to terminate, "contractual provisions" (as opposed to those which covered mandatory subjects of bargaining) wou'd immediately come to an end, particularly including dues checkoff.

Ballow's carefully construed argument has a medieval tone. Since Schade did not use the appropriate magic words in the March 15 letter, it could not have terminated the contract. This, however, does not take into consideration the past history of bargaining between these parties or other extrinsic evidence which clearly slows the Union's position and which reasonably put the Respondent on notice concerning it.

Having carefully considered Ballow's testimony, I am persuaded that, following receipt of the Union's March 15 letter, he undertook to posture the Respondent in such a way that by using a technicality, which Ballow admits, the Respondent would not be required to bargain with the Union over the subjects covered in the two contracts until 1977. I conclude that this was a deliberate attempt to avoid the Respondent's obligation to bargain with the Union on the full range of mandatory subjects. If the March 15 letter was inartfully drafted, at best the defect was technical.

A mere technical deficiency in complying with the termination of clause of a contract is not sufficient reason to excuse one's obligation to bargain in good faith.

In a substantially similar situation, the union did not give the proper termination notice under the contract but it did file with the Federal Mediation Conciliation Service Standard Form F-7, a copy of which was sent to the employer within the appropriate time interval. In finding that such a notice was legally effective to reopen the contract for negotiations, the Board adopted Ad-

ministrative Law Judge Fitzpatrick's reasoning which concluded that "So long as the essential message was conveyed, it is not reasonable for Respondent to hold them to the standards of a Philadelphia lawyer." *Champaign County Contractors Association,* 210 NLRB 467, 470 (1974).

Similarly, in *South Texas Chapter, Associated General Contractors,* 190 NLRB 383 (1971), the union had failed to use the word "termination" in its reopening letter. Nevertheless, in analyzing the letter against the contract clause, the Board concluded that the union had in fact terminated the contract and the employer was therefore required to bargain for a new one. The significance of this case does not involve the particular words of the Union's letter. Rather, the Board will interpret an ambiguous letter to find the union's true intent.

I find that the essential message was in fact conveyed, even if not in the precise, technical terms of the contract. It is clear from the letter that the Union considered the contract would expire on May 31 and it wished to negotiate changes to take effect "during the contract period commencing June 1, 1976." A collective-bargaining agreement is a total document. Changes in one or more of its terms necessarily implies termination of the agreement and emergence of a new one. The Union's March 15 letter necessarily implied termination.

In 1973, Schade sent the identical letter to the Respondent concerning negotiating new contracts. At that time there was no question concerning the effectiveness of the letter and indeed the parties did negotiate new contracts. Inasmuch as they were unable to reach these agreements until after the May 31, 1973, expiration date, extension agreements were entered into.

The point here is that the past practice was to treat the Charging Parties' letter as a letter to reopen the contract for negotiation of all substantive terms and absent agreement prior to May 31 the contract would terminate as of that date. However, the Union would consider entering into extension agreements.

Further evidence of Schade's actual intent are his letters of April 11 and 19 transmitting the Union's proposals. He stated in each letter: "Enclosed please find two (2) copies of the Union's proposal to amend the current District Managers contract, which expires on May 31, 1976."

Schade would not have used the phrase "which expires on May 31, 1976," had he in fact taken the position that the contract would continue in full force in effect after that date.

The Respondent contends that on every occasion from April 6 on, when asked if he intended by his March 15 letter to have terminated the contracts, Schade responded in the negative. Thus at the April 21 meeting, Ballow gave Schade a letter which said, in material part, "It is the understanding of The Oakland Press that any agreement—written, oral, or implied—or any condition of employment between the parties will terminate as of May 31, 1976."

Since Schade did not agree to the conclusions of this letter, such means, according to the Respondent, that the Union did not intend that the contracts would terminate as of May 31. Such is a possible construction of Schade's response. Equally possible, and in my view more probable, Schade did not believe that all conditions of employment should or would terminate.

At the April 21 meetings, and those which followed, Ballow may very well had been talking about terminating the collective-bargaining agreement but keeping such matters as wages in effect, at least until impasse. However, I believe Schade when he says that he thought Ballow was talking about terminating the collective-bargaining relationship. Schade may be an experienced labor representative but that does not necessarily mean that he is totally versed in the fine nuances of words of art in these matters. At best there was confusion and no real meeting of the minds concerning what the parties meant when they talked about what the Union intended by its March 15 letter.

Ballow testified from extensive notes he took during the negotiating sessions. As indicated, the thrust of his testimony is that he asked the union spokesman (normally Schade but on occasion Edgar Scribener, the Union's president) whether the Union had intended to terminate the contract. Every time he was told no. While I have no doubt that Ballow's testimony is literally accurate, I am also convinced that it is incomplete and does not present the true picture.

For instance, Ballow testified concerning the May 26 meeting in part:

> He [Scribener] said the union was going to operate on the same basis that it has operated in the past. The union felt it had a contract which expired on May the 31st, 1976. He understood the company's position, that they had a one year extension. And I said, "Now, Mr. Scribener, you've injected a new word into this. You are now using the word 'expire' for the first time that I have heard it."

It may be that this was the first time a union representative had actually spoken the word "expire" during their meetings. But this was not the first usage of the word in this matter. Schade's letter of April 11 and 19 transmitting his proposals referred to the contract "which expires on May 31, 1976."

In any event, regardless of what occurred on and after April 21, the question is whether or not the letter of March 15 was sufficient to terminate the contract such that the Respondent would be required to negotiate with the Union for a successor agreement and bargain in good faith on all mandatory subjects.

I find that the Union substantially complied with the termination clause of the contract. In addition to sending the letter of March 15, Schade filled out the Federal Mediation Conciliation Service Form F-7 which also went to the Respondent. Reading the letter in light of the parties' past practice, along with the FMCS Form F-7, there can be no doubt concerning what the

Union had in mind—to reopen the collective-bargaining agreement for negotiation on all matters involving wages, hours, and terms and conditions of employment. In short, to terminate the 1973-76 contracts and negotiate new ones at any time.

The Respondent cites several cases where the Board "strictly construed" the provisions of a contract which foreclosed automatic renewal. These cases are substantively distinguishable in that they dealt with the time period within which notice must be sent. Even so, "the Board will consider mitigating circumstances, in determining the timeliness of a notice," such as the postal service not promptly delivering the letter. Mailing the letter was considered to be compliance with the termination clause. *United Electronics Institute of Iowa,* 222 NLRB 814 (1976).

This situation is in any event more analagous to *Champaign County Contractors Association, supra,* and *South Texas Chapter, Associated General Contractors, supra,* where the Board looked through form to substance and found sufficient compliance with the termination clause to foreclose automatic renewal.

But the Respondent contends that the Union had a reason for not actually terminating the contract during these negotiations —namely, to be able to have the production of the picket line clause should other unions strike. The Respondent also argues that, upon termination, the "noncontractual" checkoff provision would automatically end, and this the Union did not want. There is no evidence, however, that during their several meetings Ballow ever explained this Byzantine reasoning when he was attempting to "clarify" the Union's position. Further, there is no evidence that other unions would strike during the period following May 31 when the Union and the Respondent might still be negotiating. Finally, there was no picket line clause in the district managers' contract and therefore Ballow's reasoning would not be applicable to that situation in any event.

Nor does it follow that the checkoff clauses would automatically terminate.

In attempting to give credibility to its contention that it believed the Union had not terminated the contract, the Respondent attributes a strategy to the Union that I find it did not have.

Each of these contracts has a no-strike probation. Thus the Respondent's reasoning also implies that the Union set out to negotiate changes knowing that the Respondent was not required to bargain concerning those subjects covered in the contracts and knowing that it was foreclosed from using economic pressure. Such is so unreasonable that the Respondent could not seriously have believed this to be the Union's bargaining posture.

I am persuaded that the Respondent knew what the Union had in mind when it sent the March 15 letter—to renegotiate, as it had in the past, a new contract, which implies termination of the old. Had Ballow accepted this and undertaken to negotiate with the Union during April and May, it is not unreasonable to conclude that the contract would have been executed by May 31 or at least shortly thereafter. It is also reasonable to believe that the parties would have entered into an extension agreements as they had in the past. By raising this issue of whether the Union's notice effectively "terminated" the contract, the Respondent obstructed what had previously been an amiable collective-bargaining relationship. By doing so and by now refusing to renegotiate with the Union concerning all mandatory subjects of bargaining, the Respondent has violated its obligations under Section 8(a)(5) of the Act.

In view of the foregoing, I find it unnecessary to decide the additional issue of whether or not the Respondent waived the alleged inadequacy of the notice.

Conclusions Of Law

1. The Oakland Press Company, a Subsidiary of Capital Cities Communications, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) fo the Act.

2. Local 372, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All circulation department truckdrivers and city dealer drivers of the Respondent, excluding all other employees, guards, and supervisors as defined in the Act is a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. All circulation department district managers of the Respondent, excluding all other employees, guards, and supervisors as defined in the Act is a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. The above-named Union is, and at all times material hereto has been, the exclusive collective-bargaining representative of the employees in the units described in paragraphs 3 and 4 above.

6. On or about March 15, 1976, the Union sent appropriate notices to the Respondent pursuant to the provisions of the collective-bargaining agreements in existence between it and the Respondent covering employees in the units above described to terminate or cancel the respective contract and to renegotiate a new contract.

7. The Respondent, by failing and refusing to bargain collectively with the Union as the exclusive representative of the employees in the above-described units concerning mandatory subjects of bargaining since on or about April 21, 1976, has

engaged in and is engaging in an unfair labor practice within the meaning of Section 8(a)(5) of the Act.

8. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent engaged in an unfair labor practice, I will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I will recommend that the Respondent be ordered, upon request from the Union, to bargain with the Union as the representative of the employees in the units herein found appropriate concerning all mandatory subjects of bargaining, and if an understanding is reached to embody the same into a written signed agreement.

I further recommend that the Respondent post the notice set forth in the appendix attached to this Decision.

Upon the foregoing findings of fact, conclusions of law, the entire record in this matter, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[3]

The Oakland Press Company, Detroit, Michigan, a Subsidiary of Capital Cities Communications, Inc., its officers, agents successors, and assigns, shall:

---

[3] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Failing and refusing to bargain collectively upon request with Local 372, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the exclusive representative of its employees in the above-described appropriate units with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right is affected by the proviso to Section 8(a)(3) of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named labor organization as exclusive representative of all employees in the above-described bargaining units with respect to rates of pay, wages, hours of work, and other terms and conditions of employment and if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its principal office copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provid-

[4] In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ed by the Regional Director for Region 7, after being duly signed by the Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply therewith.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

After a hearing at which all sides had the opportunity to present evidence, the National Labor Relations Board has found that we have violated the National Labor Relations Act and has ordered us to post this notice and to comply therewith.

WE WILL NOT fail or refuse to bargain collectively, upon request, with Local 372, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of our employees in the appropriate units described below with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment. The bargaining units are:

All Circulation Department Truckdrivers, and City Dealer Drivers, excluding all other employees, guards and supervisors as defined in the Act.

All Circulation Department District Managers, excluding all other employees, guards, and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right is affected by the proviso to Section 8(a)(3) of the Act.

WE WILL bargain collectively, upon request, with Local 372, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of our employees in the appropriate units described above with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

THE OAKLAND PRESS CO.
A SUBSIDIARY OF CAPITAL
CITIES COMMUNICATIONS,
INC.

APPENDIX F

The Oakland Press Co., a Subsidiary of Capital Cities Communications, Inc. *and* Local 372, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.
Case 7-CA-13059

June 6, 1980

SUPPLEMENTAL DECISION AND ORDER

By Chairman Fanning and Members
Penello and Truesdale

On May 6, 1977, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding.[1] The Board therein adopted, *inter alia,* the Administrative Law Judge's finding that the carriers are not employees and that therefore the circulation department district managers directing them are not statutory supervisors but are employees with whom Respondent refused to bargain in violation of Section 8(a)(5) of the National Labor Relations Act, as amended.

Thereafter, Respondent petitioned the United States Court of Appeals for the Sixth Circuit to review and set aside the Board's Order, and the Board filed a cross-application for enforcement of its Order. On October 4, 1979, the court issued its opinion wherein it, *inter alia,* remanded to the Board the issue of the employee status.[2] The Board accepted the remand and invited the carriers' parties to submit statements of position with respect to the issues raised by the remand. The General Counsel, Respondent, and the Union thereupon filed such statements with the Board.

---

[1] 229 NLRB 476.

[2] 606 F.2d 689.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed its Decision in the light of the court's opinion and the statements of position and has decided for the reasons set forth below that the carriers are employees within the meaning of the Act and the district managers are supervisors within the meaning of the Act.

Respondent, which is engaged in the publishing and printing of The Oakland Press, has that newspaper delivered to city and suburban subscribers respectively by about 1,250 city carriers, whose ages range from 11 to 14 years, and about 35 to 40 adult motor route suburban carriers. They are directly responsible to 1 of 15 district managers who in turn report to the 2 zone managers to discuss scheduling and other problems that may arise. The circulation manager has overall responsibility for the entire circulation department.

The carriers are hired by a district manager to make house-to-house deliveries within a prescribed route in his particular district. In this connection, applicants for both city and suburban routes are required to sign a document[3] entitled "The Oklahoma Press Independent Carrier's Route Agreement," which provides, *inter alia,* that (1) the carrier has "the exclusive right" to service all home delivery subscribers on a particular route; (2) the carrier regularly, efficiently, and promptly deliver and sell the Oakland Press to all home subscribers on the route "at the established rate"; (3) the carrier does all in his power to promote and extend the circulation of that newspaper; (4) the carrier does not deliver any other newspaper or other type of printed material not authorized by Respondent; (5) the carrier

---

[3] Parents of city carriers are also required to sign said agreement after the district manager explains their duties.

supply a substitute when he is unable to make deliveries; (6) the carrier regularly and promptly pay to Respondent the "established wholesale price" for all copies of the newspaper ordered by him; and (7) either party may terminate the agreement "without cause" upon 30 days' notice and Respondent may terminate the agreement "without notice for good and sufficient reason."[4]

Pursuant to the terms of the agreement, the city and suburban carriers sell the newspapers at subscription rates set by Respondent. They usually receive 4 and 6 cents respectively for each subscription copy they deliver.[5] In those situations where there are too few subscribers to produce sufficient income to attract and retain carriers, Respondent "subsidizes" the route by providing the carriers with a "bonus."

Carriers are encouraged to secure more subscribers within their own routes.[6] Carriers are also expected to participate in promotional campaigns, which are financed by Respondent, and are rewarded with prizes or trips for obtaining additional subscribers. When Respondent offers "money back guarantees" to new subscribers, it is Respondent rather than the carrier who makes such reimbursements to thos subscribers who request it.

---

[4] An older form of the agreement, which was discontinued about 1973, referred to the carrier as a separate and independent contractor and required him to post a bond of $10.

[5] Carriers receive somewhat less when delivering sample copies which Respondent makes available without charge to potential subscribers.

[6] However, carriers who do not live within their assigned routes are permitted to serve their own family and immediate neighbors.

Carriers must make regular payments to Respondent for all non-paid-in-advance subscribers[7] including those who are delinquent. If a carrier fails to deliver any of the copies he has ordered, Respondent bills him for them. However, Respondent replaces without cost to the carrier copies which are damaged or lost for any reason.

Respondent does not make deductions on behalf of the carriers for social security and income tax purposes. They do not receive any of Respondent's fringe benefits such as those pertaining to vacations and hospitalization and are not covered by workmen's compensation, but Respondent pays part of the premium for accident insurance if a carrier desires such coverage.

Respondent, which no longer requires new carriers to post a bond, does not sell routes to new carriers and forbids departing carriers to do so. Respondent furnishes carriers without charge collection cards and routebooks and provides without cost to suburban carriers tubes in which they are required to deposit the newspapers they deliver. Suburban carriers also receive a vehicle allowance, the amount of which is calculated by the district manager who determines the mileage by accompanying the carrier on his rounds. Thus, carriers incur no expense of their own in taking over a route except for the nominal cost of a bag which, however, is not mandatory, and may be given to them without charge by their predecessors.

The district managers see to it that the carriers perform their duties properly. As indicated above, they explain to newly hired carriers, whose average length of service appears to be from 6 months to a year, what is expected of them with respect to prompt delivery in a dry location, collections, and participation in promotion campaigns. In some cases, district managers accom-

---

[7] All paid-in-advance subscribers make their payments directly to Respondent.

pany new carriers to point out the best way to handle the route. Generally, however, new carriers are shown the route by their predecessors. Thereafter, the district managers check on the various aspects of the performance of the carriers, about 30 percent of whom require special attention.

As indicated above, district managers carefully monitor the carriers in regard to collections and insist that they turn them in promptly. In the event that a subscriber is delinquent or a "slow payer," the district manager accompanies the carrier to straighten out the matter with the subscriber and, if necessary, cancel the subscription. The carrier's authority in this regard is limited to situations where a subscriber has moved away.

Upon receipt of complaints from subscribers as to poor service or litter at bundle drop locations where newspapers are picked up by carriers, the district manager takes up the complaint with the carrier and telephones or visits the subscriber to settle it. The district managers also handle the carriers' grievances as to difficulties in dealing with certain subscribers.

Although carriers are expected to provide substitutes who must be satisfactory to the district manager, if they are unable to work at any time, the district manager has the responsibility to find a substitute when the carrier fails to do so.[8] If the substitute is inexperienced, the district manager instructs him as to the rules regarding proper delivery and collections.

The district managers decide whether to split or consolidate routes and set the boundaries thereof. They also transfer the carriers from one route to another and make recommendations as to which carriers should be cited for excellent performance or deemed eligible for participation in a paid scholarship program. Finally, the district managers decide whether to terminate carriers who refuse to make deliveries in designated locations, per-

---

[8] Substitutes are paid by either carriers or Respondent.

sist in refusing to participate in promotional campaigns,[9] or otherwise perform their duties in an unsatisfactory manner.

Respondent contends that the carriers are employees and that the district managers who direct their activities are statutory supervisors with whose representative it has no duty to bargain. However, the General Counsel and the Union argue that the carriers are independent contractors, that Respondent's past characterization of them as such belies its present position, and that therefore the district managers cannot be deemed statutory supervisors despite their role in exercising authority over the carriers.

The first issue to be resolved is the status of the carriers. In determining whether individuals are independent contractors or employees under the Act, the Board has consistently applied the right-to-control test. Under this test, an employer-employee relationship exists when the employer reserves the right to control not only the result to be achieved but also the means to be used in attaining the result. However, when the employer has reserved only the right to control the ends to be achieved, an independent contractor relationship exists.

Certain factors point toward the independent contractor status of the carriers. Thus, (1) carriers are not on Respondent's payroll and are required to sign an agreement which gives them "the exclusive right" to service all subscribers on their particular route. (2) Their income, which is not in the form of wages or salaries, usually constitutes the difference between the price of each copy and the subscription rate. (3) Respondent does not withhold social security and income taxes on behalf of the carriers. (4) Respondent does not provide workmen's compensation for the carriers. (5) Respondent does not grant car-

---

[9] Although Ronald Hoadley, one of the district managers, testified that he would "probably" take no action against such a carrier, Circulation Manager Richard Land testified that district managers have the authority to terminate carriers for that reason.

riers any fringe benefits except for the option as to accident insurance. (6) Carriers are given an opportunity to enhance their income and are eligible for prizes and awards by obtaining new subscribers. (7) Carriers assume the risk of loss when subscribers on their route are delinquent and Respondent bills carriers if they fail to deliver any copies they have ordered. (8) Carriers who desire to have shoulder or saddle bags must purchase them unless their predecessors provide them with used bags without charge.

However, the foregoing factors are clearly outweighed by the following factors which, notwithstanding the characterization of the carriers in the route agreement as "independent," demonstrate their employees status:

(1) Respondent establishes the wholesale and retail price of the newspaper, thereby controlling to a great extent the carriers' income. (2) The opportunity for additional income through the carriers' efforts in securing new subscribers is limited because (a) the carriers must, with the exception of their own parents and immediate neighbors, deliver newspapers only within their assigned route and (b) the carriers are prohibited from delivering any other newspapers or printed material without authorization by Respondent. (3) Respondent has the unilateral right to change the size of the route. (4) Carriers are subject to transfer by the district managers. (5) The carriers have no proprietary interest in their routes and are not required to post a bond or pay for the route or the subscriber list. (6) Carriers do not have to pay Respondent for copies which are damaged or lost for any reason. (7) Although carriers bear the loss in the event of a subscriber's delinquency, their risk is minimized by the district manager's assistance in seeking to collect from such subscribers. (8) Respondent finances promotional campaigns. (9) District managers have substantial control over the carriers by training newly hired carriers and substitutes, instructing them as to their duties, checking on and evaluating the carriers' performance, assigning them to new routes, resolving the complaints of

subscribers and the grievances of carriers, and terminating carriers when their work is unsatisfactory.

In view of the substantial control by the district managers over the carriers, the absence of the proprietary interest on the part of the carriers, their insulation from most losses, and the limited opportunity for significantly increasing their income, we now reverse our earlier finding and conclude in the light of the Board's more recent Decisions that the carriers are employees within the meaning of the Act.[10]

We turn now to the question whether the district managers are employees or supervisors within the meaning of the Act. It is clear from the foregoing that the district managers hire, discharge, assign, transfer, and responsibly direct the carriers whom we have found to be employees. We therefore find that the district managers are supervisors within the meaning of Section 2(11) of the Act. As employers do not have a statutory obligation to bargain with their supervisors, we withdraw our previous finding that Respondent violated Section 8(a)(5) of the Act by refusing to bargain with the Union on behalf of the district managers. We shall therefore modify our original Order accordingly.

ORDER

It is hereby ordered that the complaint herein is dismissed insofar as it alleges that the Respondent, The Oakland Press Co., a Subsidiary of Capital Cities Communications, Inc., Detroit, Michigan, violated Section 8(a)(5) of the Act by refusing to bargain with Local 372, international Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of

---

[10] See *Philadelphia Newspapers, Inc.*, 238 NLRB 835 (1978). See also *The Virginian-Pilot/Ledger Star, Capital Division of Landmark Communications, Inc.*, 241 NLRB No. 81 (1979), wherein the carriers were found to be employees despite the employer's past characterization of them as independent contractors.

America, on behalf of the circulation department district managers.

Member Truesdale, dissenting:

The facts in this case are, in most critical respects, the same as those in *The Virginian-Pilot/Ledger-Star,* 241 NLRB No. 81 (1979), in which I dissented from the majority's findings there that the newspaper carriers were employees and that the district managers were supervisors within the meaning of Section 2(11) of the Act. For the reasons stated in my dissent in *Virginian-Pilot/Ledger-Star,* and those explicated below, I would find—contrary to my colleagues—that the newspaper carriers here are independent contractors, that the district managers are employees within the meaning of Section 2(3) of the Act, and that Respondent therefore unlawfully refused to bargain with the Union representing the unit of district managers.

Until recently, Respondent maintained that the carriers were independent contractors.[11] Its present position, as announced at the hearing in this matter, is that newspaper carriers are employees. However, the record evidence, including Respondent's past characterization of its business relationship with the carriers, belies its present position. Thus, Respondent's current agreement governing its relationship with the carriers refers to the carrier as an "independent carrier." Also, Respondent's insurance policy specifically uses the legal term "independent contractor" in referring to the carrier. While these facts are not alone controlling, they do manifest Respondent's intention to avoid creating an employer-employee relationship with the newspaper carriers.

---

[11] In 1970, when a petition was filed seeking a unit of district managers, Respondent asserted that the unit was inappropriate because both the district managers and carriers were independent contractors.

When the foregoing is considered in conjunction with the evidence, *infra,* showing that Respondent has clothed the carriers with the indicia of an independent contractor, it becomes clear that the relationship Respondent has established with its paper carriers is that of employer-independent contractor. Unlike its regular employees, carriers are not on Respondent's payroll and do not receive any of the fringe benefits accorded to regular employees. Carriers are also not entitled to workmen's compensation. Rather than wages or salaries, the carriers' compensation consists of the difference between the wholesale price of the newspaper and the amount collected from customers at the suggested retail price. Also, no deductions for Federal and state taxes are made by Respondent from the carriers' profits. Significantly, carriers, unlike regular employees, are required to sign an agreement, entitled "Oakland Press Independent Carrier's Route Agreement,"[12] before they can assume responsibility for the route.

Of particular importance to the carriers' independent contractor status is the fact that the carriers' parents are present when the agreement is signed, thus signaling the important intermediary role played by the parents in the relationship between the carrier and Respondent. This role is born of the fact that Respondent has no authority to discipline the carrier and therefore Respondent undoubtedly prevails upon the parents to exercise their authority to see that the paper is delivered. In addressing this point in my dissent in *Virginian-Pilot/Ledger-Star,* I stated:

> As a natural corollary of their youth, carriers necessarily require the continued guidance and supervision of their parents in their daily activities. Because of this continuing

---

[12] The agreement requires either party to give 30 days' notice of an intent to terminate the agreement. Respondent, however, may terminate the agreement "without notice for good and sufficient reason."

responsibility of parents for their children, it is ony natural that the Employer actively recruits their aid in controlling the carriers in the operation of their routes. However, by interposing the parents into that relationship between the carrier and itself, the Employer has effectively severed its lines of control over the carrier. As a result, the intermediation of the parents into this relationship, along with other factors discussed above, compels the conclusion that carriers are independent contractors.

The carrier's independent contractor status is also evidenced by the fact that the carrier's overall opportunity for profit or loss lies almost entirely within his own efforts. Further, the carrier's risk of loss, when measured against the small scale of his business, is also substantial. Thus the carrier alone bears the loss when he is robbed, when papers are damaged, or when the customer fails to pay.

Finally, the large number of carriers for whom a district manager is responsible strongly militates against the finding of employee status. Thus, the district manager is responsible for approximately 90 carriers who perform their delivery tasks at roughly the same time every day. The majority's finding that Respondent exercises substantial control over the carriers' delivery tasks is therefore clearly unfounded, especially in light of the short-term character of the delivery schedule and the relatively simple and routine nature of the delivery tasks. In short, the evidence indicates that Respondent's sole concern is with the end result—the timely delivery of the newspaper and the prompt payment of sums owed to it.

In light of all the foregoing, I would find that the carriers are independent contractors and would accordingly find that the district managers are employees and constitute a unit appropriate for collective bargaining under the Act. I would therefore find that Respondent has violated Section 8(a)(5) of the Act by refusing to bargain with the Union that currently represents the district managers.

APPENDIX G

The Oakland Press Co., a Subsidiary of Capital Cities Communications, Inc *and* Local 372, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.
Case 7-CA-13059

February 7, 1983

SECOND SUPPLEMENTAL DECISION

By Members Jenkins, Zimmerman, and Hunter

On May 6, 1977, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding.[1] The Board then adopted, *inter alia,* the Administrative Law Judge's finding that the carriers are not employees and that therefore the circulation department district managers directing them are not statutory supervisors but are employees with whom Respondent refused to bargain in violation of Section 8(a)(5) of the National Labor Relations Act, as amended.

Thereafter, Respondent petitioned the United States Court of Appeals for the Sixth Circuit to review and set aside the Board's Order, and the Board filed a cross-application for enforcement of its Order. On October 4, 1979, the court issued its opinion wherein it, *inter alia,* remanded to the Board the issue of the carriers' employee status.[2] The Board accepted the remand and invited the parties to submit statements of position with respect to the issues raised by the remand. The General Counsel, Respondent, and the Union thereupon filed such statements with the Board.

---

[1] 229 NLRB 476.

[2] 606 F.2d 689.

On June 6, 1980, the Board issued a Supplemental Decision and Order in which it found that the carriers are employees within the meaning of the Act and the district managers are supervisors within the meaning of the Act.[3] On June 25, 1980, the Union filed with the Board a motion for rehearing *en banc,* and on July 28, 1980, the Board denied said motion.

Thereafter, the Union filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit. Respondent and the Board then filed motions seeking discretionary transfer to the United States Court of Appeals for the Sixth Circuit and said motions were granted *per curiam* on November 28, 1980.

On June 29, 1982, the court issued its opinion[4] wherein it found that "there is no question but that the . . . fact-finding" of the Board in its Supplemental Decision as to the employee status of the carriers "does have substantial support." However, in view of the Union's argument "that [Respondent] should be equitably estopped from asserting a position completely inconsistent with its past conduct and representations," the court remanded the case to the Board for "the limited purpose of determination of the equitable estoppel issue." The Board accepted the remand and invited the parties to submit statements of position with respect to the issue raised by the remand. Respondent filed such a statement with the Board.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

---

[3] 249 NLRB 1081.

[4] 682 F.2d 116, 118.

The Board accepts the court's opinion as the law in the case, and accordingly has reviewed its Supplemental Decision in light of the court's opinion and Respondent's statement of position. For the reasons set forth below, we conclude that equitable estoppel does not lie in this case and that, in any event, the requisites for application of the doctrine of equitable estoppel are not present herein.

The record shows that the Union filed on February 24, 1970, a petition with the Board seeking ceritification as a representative of the district managers. Thereafter, Respondent and the Union executed a consent election agreement stating that the carriers were nonemployees and that the district managers who directed them were accordingly not supervisors within the meaning of the Act. However, a Regional Director of the Board refused to approve the consent election agreement and submitted the issue of the status of the carriers to the Board. Before that issue was decided by the Board, the Union withdrew its petition and requested the Michigan Employment Relations Commission to conduct an election that was won by the Union which was thereupon certified by the Commission as the bargaining representative of the district managers. Thereafter, said unit was covered by two successive collective-bargaining agreements, the second of which expired in May 1976 when Respondent withdrew its recognition of the Union and refused to bargain with it on the ground that the carriers were employees as defined in the Act and that the district managers who directed them were supervisors within the meaning of the Act. As indicated above, the Board accepted the first remand of the court and agreed with Respondent's position.

We now turn to the issue of equitable estoppel pursuant to the second remand of the court. "It is well established that one who claims under the doctrine of equitable estoppel must show (1) lack of knowledge and the means to obtain knowledge of the true facts; (2) good faith reliance upon the misleading conduct

of the party to be estopped; and (3) detriment or prejudice from such reliance."[5]

However, the Board has in a number of cases held that it is obliged to give paramount consideration to the provisions of the Act regardless of earlier positions taken by any party. Thus, the Board has consistently found that a preelection agreement wherein, as here, an employer stipulates that certain individuals are not supervisors within the meaning of the Act does not estop the employer from subsequently contesting their status because unit inclusion of individuals who are shown to be statutory supervisors would without question contravene the Act.[6]

The Board has also held that it will not recognize the validity of state-conducted elections and certifications where, as here, the composition of the unit is at variance with the policies enunciated by Congress in the Act.[7] The Board further emphasized its obligation to comply with the statutory exclusion of supervisors when it held that even where, as here, certain individuals have for some time been covered by collective-bargaining agreements, It is compelled subsequently to exclude them from the appropriate unit if it can be shown that they meet the test for a Board finding that they are supervisors as defined in the Act.[8]

It is clear from the foregoing Board Decisions that the parties' stipulated unit, the certification of said unit by the State of Michigan, and collective bargaining agreements for that unit prevail under these circumstances. Accordingly, we find that the princip;e of equitable estoppel is not applicable in the instant case.

---

[5] *N.L.R.B. v. J.D. Industrial Insulation Company, Inc.*, 615 F.2d 1289, 1294 (10th Cir. 1980).

[6] *Esten Dyeing & Finishing Co., Inc.*, 219 NLRB 286 (1975); *Fisher-New Center Co.*, 184 NLRB 809 (1970).

[7] *Mental Health Center of Boulder County, Inc.*, 222 NLRB 901 (1976).

[8] *Washington Post Company*, 254 NLRB 168 (1981).

However, assuming *arguendo* that equitable estoppel may be applied herein, we find that this case does not meet the essential criteria thereof.

As indicated above, the Regional Director in 1970 refused to approve the stipulated unit of district managers and hence referred the question of its propriety to the Board. The Union, which was therefore fully aware of that outstanding legal issue, nevertheless withdrew its petition without waiting for its resolution by the Board. The Union and Respondent, which then sought and secured a certification of said unit by a state tribunal, proceeded to bargain for that unit. As a result, the Union and its members benefited from Respondent's willingness, despite the lack of Board approval or certification, to enter into and until May 1976 abide by collective-bargaining agreements which covered the district managers. Insofar as the subsequent loss of continued recognition by Respondent constituted a detriment to the Union, it was not attributable to any misleading conduct on the part of Respondent. Accordingly, we conclude that in circumstances of this case there is no basis for equitable estoppel.

As stated above, the court does not question the Board's finding that the carriers are employees within the meaning of the Act and that the district managers are statutory supervisors. As we have found that equitable estoppel does not lie in this case and that, in any event, the requisites for equitable estoppel have not been met, we hereby affirm the Order set forth in the Supplemental Decision of June 6, 1980.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 83-5311

Newspaper Drivers & Handlers Local #372, etc.,
Petitioner,

v.

National Labor Relations Board,
Respondent,

The Oakland Press Company,
Intervenor.

Before: MARTIN and KRUPANSKY, Circuit Judges; REED, District Judge.

JUDGMENT

ON PETITION TO REVIEW a decision of the National Labor Relations Board.

THIS CAUSE came on to be heard on the transcript of record from the said Agency and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the decision of the said Agency in this cause be and the same is hereby enforced.

It is further ordered that all parties are to bear their own costs on appeal.

Entered by Order of the Court

John P. Hehman, Clerk

Issued as Mandate: AUGUST 23, 1984

COSTS: NONE

Filing fee.....$
Printing.....$
Total.....$

A True Copy.

Attest:

Audrey Crowbell
Deputy Clerk

APPENDIX I

No. 83-5311

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Newspaper Drivers & Handlers Local #372,
a/w International Brotherhood of Teamsters,
Chauffeurs, Warehousemen & Helpers
of America,
Petitioner

v.

National Labor Relations Board,
Respondent

Before: MARTIN and KRUPANSKY, Circuit Judges; and REED, District Judge.*

ORDER

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc in the above styled case; and

No judge in active service in this Court having moved for rehearing en banc and the motion therefore having been referred to the panel which heard the case; and

The panel having noted nothing of substance in said motion for rehearing which had not been carefully considered before issuance of the Court's opinion,

Now, therefore, the motion for rehearing is hereby denied.

Entered By Order Of The Court

John P. Hehman
Clerk

---

* Honorable Scott Reed, United States District Judge for the Eastern District of Kentucky, sitting by designation.

APPENDIX J

SUPREME COURT OF THE UNITED STATES

No. A-348

Newspaper Drivers and Handlers, Local No. 372,
International Brotherhood of Teamsters,
Chauffeurs, Warehousemen and Helpers of America,
Petitioner,

v.

National Labor Relations Board, et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner.

It is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 17, 1984.

/s/ Sandra D. O'Connor
Associate Justice of the Supreme
Court of the United States

Dated this 2nd
day of November, 1984

APPENDIX K

Federal Statutes Involved

National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.*

Section 1 (29 U.S.C. § 151):

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of

industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 2 (29 U.S.C. § 152):

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence f, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any

individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C.A. §151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

* * *

(11) The term "supervisor" means any individual having authority, in the interst of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 8 (29 U.S.C. §158):

(a) It shall be an unfair labor practice for an employer—

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 14 (29 U.S.C. §164):

(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

APPENDIX L

Relevant Provisions of the Collective Bargaining Agreement Between Newspaper Drivers and Handlers, Local 372 and The Oakland Press Co.

AGREEMENT

THIS AGREEMENT, made and entered into between THE OAKLAND PRESS COMPANY, hereinafter known as the Publisher, and NEWSPAPER DRIVERS AND HANDLERS, LOCAL 372, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter known as the Union, this 17th day of August, 1973, and to be effective through May 31, 1976.

ARTICLE I. RECOGNITION AND UNION SHOP

SECTION 1

The Publisher recognizes and acknowledges that the NEWSPAPER DRIVERS AND HANDLERS, LOCAL 372, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is the exclusive representative in collective bargaining with the Publisher for all Circulation Department District Managers. The term "employee" or "employees", as hereinafter used in this Agreement, refers to Circulation Department District Managers and Circulation Department Relief Men only.

* * *

ARTICLE VI. SENIORITY

1. Seniority is defined as an employee's length of service from his last date of hire. Strict seniority shall prevail in the layoff and recall of employees. In reducing the work force because of lack of work or other legitimate cause the last employee hired shall be the first employee laid off and the last employee laid off shall be the first employee rehired. A newly hired employee

shall be a probationary employee for the first ninety (90) calendar days, during which period he may be terminated by the Publisher without recourse; provided, however, that the Publisher may not discharge or discipline a probationary employee for the purpose of evading this Agreement or discriminating against Union members. At the successful conclusion of such probationary period the employee's seniority shall be established back to his date of hire.

* * *

F. PENSION PLAN: The Publisher agrees to contribute the amount of $6.00 per week per employee from and after June 1, 1973, to the Union's Central States, Southeast and Southwest Areas Pension Fund. The Publisher will be under no obligation to make other pension contributions on account of employes covered by this Agreement.

* * *

APPENDIX M

Excerpt from Transcript of Proceedings Before Administrative Law Judge

[Pages 57-58: Questioning of District Manager Ronald Hoadley]

* * *

Q. (By Mr. Miller) Mr. Hoadley, in conection with General Counsel's exhibit two, the form agreement, can you tell us whether there has been any change in that to your knowledge in the last four years?

A. The last four years, yes.

Q. When was this form agreement—when did it come into effect?

A. I believe about three years ago, three and a half, something like that.

Q. Since that time has there been any change?

A. No.

Q. In connection with collection procedure, paper distribution center, route allocation or split procedure, have their (sic) been any changes to your knowledge in the manner in which you are supposed to deal with carriers in the last three years?

A. Yes, there has. We used to meet all the carriers on Saturday at a designated corner location, or at their houses, to pick up their money for the paper bill.

Q. And now what is the change?

A. Now carriers in the suburbs are expected to mail in their bill each week.

Q. Are there any other changes in the last three years in relationship with the carrier boys?

A. The price has changed on the paper. But, no, not that I know of.

* * *

Office-Supreme Court, U.S.
FILED
JAN 22 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-989

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

NEWSPAPER DRIVERS AND HANDLERS, LOCAL NO. 372,
A/W INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

THE OAKLAND PRESS COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

RESPONDENT THE OAKLAND PRESS COMPANY'S BRIEF IN OPPOSITION

L. MICHAEL ZINSER
KING, BALLOW & LITTLE
First American Center
Nashville, Tennessee 37238
615/259-3456
Counsel for Respondent,
The Oakland Press Company

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the decision below of the National Labor Relations Board, enforced by the Sixth Circuit Court of Appeals, that the Company's newspaper carriers are "employees" and that the Company's district managers are "supervisors" expressly excluded from coverage under the National Labor Relations Act, has warrant in the record and a reasonable basis in law?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	2
A. Factual Background	2
B. Course of Proceedings	5
SUMMARY OF ARGUMENT	9
REASONS FOR DENYING THE WRIT:	
I. The Decision Below Of The National Labor Relations Board, Enforced By The Sixth Circuit Court Of Appeals, That The Company's Newspaper Carriers Are "Employees" And That The Company's District Managers Are "Supervisors" Expressly Excluded From Coverage Under The National Labor Relations Act Has Warrant In The Record And A Reasonable Basis In Law	10
A. This Case Is Unremarkable Since It Involves The Board's Application Of Well-Established Agency Principles To A Very Particularized Fact Situation And Hence Will Affect Few, If Any, Other Litigants	11
B. Petitioner's Assertion Of An Implied Exclusion For Newspaper Carriers Is Meritless And Flies In The Face Of Congressional Intent And Well-Settled Rules Of Statutory Construction	18
II. The Rulings Below That The Company's District Managers Are Statutory Supervisors Are Completely Consistent With Congressional Intent And Longstanding Board And Judicial Authority	21
CONCLUSION	25
APPENDIX (Rule 28.1 List of Parent and Affiliated Companies)	1a

TABLE OF AUTHORITIES

Cases: Page

A.D.T. Company, Inc., 177 N.L.R.B. 704 (1969).. 24
Abell Publishing Co., 270 N.L.R.B. No. 181 (1984) 16, 17
Ace Doran Hauling & Rigging Co. v. NLRB, 462 F.2d 190 (6th Cir. 1972) 16
Air Transit, Inc. v. NLRB, 679 F.2d 1095 (4th Cir. 1982) 15
Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971) 10, 12
American Bank & Trust Co. v. Dallas County, —— U.S. ——, 103 S.Ct. 3369 (1983) 18
Andrus v. Glover Construction Co., 446 U.S. 608 (1980) 18
Bayside Enterprises, Inc. v. NLRB, 429 U.S. 298 (1977) 10
Beacon-Journal Publishing Co., 188 N.L.R.B. 218 (1971) 17
Beth Israel Hospital v. NLRB, 437 U.S. 483 (1978) 10
Broadway Cab Cooperative, Inc. v. Teamsters & Chauffeurs Local Union No. 281, IBT, 710 F.2d 1379 (9th Cir. 1983) 15
Brotherhood of Locomotive Firemen and Engineers, 145 N.L.R.B. 1521 (1964) 24
Brown v. NLRB, 462 F.2d 699 (9th Cir.), *cert. denied*, 409 U.S. 1008 (1972) 16, 17
Buffalo Courier-Express, Inc., 129 N.L.R.B. 932 (1960) 17
Building Material and Dump Truck Drivers v. NLRB, 669 F.2d 759 (D.C. Cir. 1981) 15
Carter Publications, Inc., 100 N.L.R.B. 599 (1952) 17
Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 18
District 2, Marine Engineers Beneficial Association v. Amoco Oil Co., 554 F.2d 774 (6th Cir. 1977) 21-22
Donrey, Inc., 223 N.L.R.B. 744 (1976) 17

TABLE OF AUTHORITIES—Continued

	Page
Drukker Communications, Inc., 258 N.L.R.B. 734 (1981)	17
El Mundo, Inc., 167 N.L.R.B. 760 (1967)	16, 17
Esten Dyeing & Finishing Co., Inc., 219 N.L.R.B. 286 (1975)	23
Eureka Newspapers, Inc., 154 N.L.R.B. 1181 (1965)	17
Federated Publications, Inc., 218 N.L.R.B. 151 (1975)	17
Field Packing Co., 48 N.L.R.B. 850 (1943)	12
Fisher-New Center Co., 184 N.L.R.B. 809 (1970)	23
Fort Wayne Newspapers, Inc., 263 N.L.R.B. 854 (1982)	16, 17
Golden State Bottling Co., Inc. v. NLRB, 414 U.S. 168 (1973)	10-11
Hanna Mining Co. v. District 2, Marine Engineers Beneficial Association, 382 U.S. 181 (1965)	21
Hearst Publications, Inc. v. NLRB, 136 F.2d 608 (9th Cir. 1943)	12, 13
Herald Co. v. NLRB, 444 F.2d 430 (2d Cir. 1971)	17
The Herald Star, Canton Division, Thomson Newspapers, Inc., 227 N.L.R.B. 505 (1976)	16, 17
Hi-Craft Clothing Co. v. NLRB, 660 F.2d 910 (3d Cir. 1981)	21
Hilton International Co. v. NLRB, 690 F.2d 318 (2d Cir. 1982)	15
The Kansas City Star Co., 76 N.L.R.B. 384 (1948)	17
Klement Timber Co., 59 N.L.R.B. 681 (1944)	12
Lake Huron Broadcasting Corp., 130 N.L.R.B. 908 (1961)	23
Las Vegas Sun, Inc., 219 N.L.R.B. 889 (1975)	17
Meyer Dairy, Inc. v. NLRB, 429 F.2d 697 (10th Cir. 1970)	16
Mid-Continent Refrigerated Service Co., 228 N.L.R.B. 917 (1977)	23
NLRB v. A. Duie Pyle, Inc., 606 F.2d 379 (3d Cir. 1979)	15

TABLE OF AUTHORITIES—Continued

	Page
NLRB v. A. S. Abell Co., 327 F.2d 1 (4th Cir. 1964)	17
NLRB v. Amber Delivery Service, Inc., 651 F.2d 57 (1st Cir. 1981)	15
NLRB v. Associated Diamond Cabs, Inc., 702 F.2d 912 (11th Cir. 1983)	15
NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974)	20, 23
NLRB v. Brush-Moore Newspapers, Inc., 413 F.2d 809 (6th Cir. 1969)	16-17
NLRB v. City Yellow Cab Co., 344 F.2d 575 (6th Cir. 1965)	22
NLRB v. Deaton, Inc., 502 F.2d 1227 (5th Cir. 1974), *cert. denied*, 422 U.S. 1047 (1975)	16
NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944)	10, 12, 13, 19
NLRB v. Hendricks County Rural Electric Membership Corp., 454 U.S. 170 (1981)	20
NLRB v. Lindsay Newspapers, Inc., 315 F.2d 709 (5th Cir. 1963)	17
NLRB v. Pepsi Cola Bottling Co., 455 F.2d 1134 (6th Cir. 1972)	16
NLRB v. St. Mary's Home, Inc., 690 F.2d 1062 (4th Cir. 1982)	23
NLRB v. Tri-State Transport Corp., 649 F.2d 993 (4th Cir. 1981)	15
NLRB v. United Insurance Co., 390 U.S. 254 (1968)	12, 14, 15, 16, 19
NLRB v. Wilson-Crissman Cadillac, 654 F.2d 728 (6th Cir. 1981)	23
The News-Journal Co., 180 N.L.R.B. 864 (1970)	17
News Journal Co. v. NLRB, 447 F.2d 65 (3d Cir. 1971)	17
News Syndicate Co., Inc., 164 N.L.R.B. 422 (1967)	17
The Oakland Press Co., 266 N.L.R.B. 107 (1983)	22, 23
The Oakland Press Co., 249 N.L.R.B. 1081 (1980)	16
P.G. Publishing Co., 114 N.L.R.B. 60 (1955)	17
Philadelphia Newspapers, Inc., 238 N.L.R.B. 835 (1978)	16, 17

TABLE OF AUTHORITIES—Continued

	Page
Phillips v. Kennedy, 542 F.2d 52 (8th Cir. 1976)	23
The Pulitzer Publishing Co., 146 N.L.R.B. 302 (1964)	17
Russello v. United States, —— U.S. ——, 104 S.Ct. 296 (1983)	19
The Sacramento Union, 160 N.L.R.B. 1515 (1966)	17
St. Charles Journal, Inc. v. NLRB, 679 F.2d 759 (8th Cir. 1982)	15, 17
San Antonio Light Division, The Hearst Corp., 174 N.L.R.B. 934 (1969) (*San Antonio Light* III)	17
San Antonio Light Division, The Hearst Corp., 167 N.L.R.B. 689 (1967) (*San Antonio Light* II)	17
San Antonio Light Division, The Hearst Corp., 130 N.L.R.B. 619 (1961) (*San Antonio Light* I)	17
Seven-Up Bottling Co. v. NLRB, 506 F.2d 596 (1st Cir. 1974)	15
Stockton Daily Record, 71 L.R.R.M. 1613 (Reg. Dir., 20th Reg., 1969)	17
The Times-Herald Printing Co., 94 N.L.R.B. 1785 (1951)	17
Times-World Corp., 151 N.L.R.B. 947 (1965)	23
United States v. Naftalin, 441 U.S. 768 (1982)	19
Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951)	11
The Vindicator Printing Co., 146 N.L.R.B. 871 (1964)	17
The Virginia Pilot/Ledger Star, Capital Division of Landmark Communications, Inc., 241 N.L.R.B. 575 (1979)	17
Walla Walla Union Bulletin v. NLRB, 631 F.2d 609 (9th Cir. 1980)	23
Warner Co. v. NLRB, 365 F.2d 435 (3d Cir. 1966)	22
Washington Post Company, 254 N.L.R.B. 168 (1981)	24
The Western Colorado Power Co., 190 N.L.R.B. 564 (1971)	24

TABLE OF AUTHORITIES—Continued

Statutes: Page

26 U.S.C. § 3121(b) (14) (A) and (B) 4
26 U.S.C. § 3306(c) (15) (A) and (B) 4
29 U.S.C. § 152(3) 6, 11, 18, 21
29 U.S.C. § 152(11) 6
29 U.S.C. § 158(a) (5) 3
29 U.S.C. § 164(a) 21
29 U.S.C. § 213(d) 19-20
M.C.L.A. § 141.606 4
M.C.L.A. § 421.43(p) 4

Other Authorities:

R. Gorman, *Basic Text on Labor Law*, at 29 (1977) 14
S. Rep. No. 105, 80th Cong., 1st Sess. 19 (1947) 21
H.R. Rep. No. 245, 80th Cong., 1st Sess., 5, 14, 18 (1947) 14-15, 21
39 Cong. Rec. 3952 (1947) 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-989

NEWSPAPER DRIVERS AND HANDLERS, LOCAL NO. 372, A/W INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

THE OAKLAND PRESS COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

RESPONDENT THE OAKLAND PRESS COMPANY'S BRIEF IN OPPOSITION

To The Honorable, The Chief Justice Of The United States Supreme Court And The Associate Justices Of The Supreme Court Of The United States:

Respondent The Oakland Press Company* respectfully prays that a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit in this case be denied.

---

* The listing of Respondent's parent and affiliated companies required by Rule 28.1 is set forth as an Appendix hereto.

STATEMENT OF THE CASE

A. Factual Background

On February 24, 1970, the Petitioner (hereinafter the Union) filed a petition with the National Labor Relations Board ("Board") seeking certification as the exclusive bargaining representative for the Respondent, The Oakland Press Company's (hereinafter the Company) circulation department district managers. (Pet. App. A-53).[1] Subsequently, the Company and the Union entered into a consent election agreement which provided that the Company's news carriers were nonemployees and that the district managers who directed their activities therefore were not supervisors under Section 2(11) of the National Labor Relations Act ("Act"). (Pet. App. A-53). A Regional Director of the Board, however, refused to place the Board's imprimatur upon the consent election agreement because of the uncertainty clouding the actual employee status of the newspaper carriers and thus the supervisory status of the district managers, and instead submitted the issue of the carriers' and district managers' statuses under the Act to the Board. (Pet. App. A-53). Before the Board could address this issue, however, the Union withdrew its petition and instead sought certification as the bargaining representative for the Company's district managers from the Michigan Employment Relations Commission. (Pet. App. A-53). An election was held, the Union was certified under Michigan law as the district manager's bargaining representative, and two successive collective bargaining agreements were negotiated between the Company and the Union. (Pet. App. A-53). In May, 1976—after the latter agreement had expired—a question arose over the Company's obligation to bargain with the Union. The Union reacted by filing an unfair labor practice charge accusing the Com-

---

[1] References to the Petition for Writ of Certiorari are herein cited as (Pet. ——); references to the Petitioner's Appendix are cited as (Pet. App. ——).

pany of refusing to bargain in violation of Section 8 (a)(5) of the Act. 29 U.S.C. § 158(a)(5). The Company's defense to this charge was predicated upon its conviction—ultimately vindicated by the Board and the Sixth Circuit Court of Appeals—that its news carriers were employees and consequently that the district managers which directed their activities were supervisors unentitled to statutory bargaining rights. (Pet. App. A-53).

The Company, which is in the business of publishing and distributing The Oakland Press, circulates its newspaper to home subscribers through approximately 1,250 youth carriers and 35-40 adult motor route carriers. (Pet. App. A-41). These carriers are responsible to one of fifteen district managers who in turn are responsible to two zone managers. (Pet. App. A-41).

The carriers are hired by a district manager to make deliveries to home subscribers along a prescribed route. (Pet. App. A-41). Applicants for carrier routes are required to sign an agreement which provides, *inter alia*, that (1) the carrier has "the exclusive right" to service all home subscribers within a fixed territory; (2) the carrier will sell the Oakland Press to all home subscribers along the particular route "at the established rate"; (3) the carrier will do all in his power to promote and increase the circulation of the Oakland Press; (4) the carrier is forbidden to deliver any other newspaper or printed matter absent the Company's authorization; (5) the carrier will furnish a substitute when he personally is unable to make his deliveries; (6) the carrier must regularly and promptly pay the "established wholesale price" to the Company for all copies of the Oakland Press he orders; and (7) either party can terminate the agreement for any reason upon 30 days' notice and the Company can terminate the agreement "without notice for good and sufficient reason." (Pet. App. A-41-A-42).

Pursuant to the terms of the agreement, the carriers sell the newspaper at subscription rates fixed by the Company. (Pet. App. A-42). Where particular routes have too few subscribers to generate enough money to attract and retain carriers, the Company subsidizes the route by providing extra compensation to carriers who deliver these routes. (Pet. App. A-42).

Carriers are expected to participate in promotional campaigns undertaken by the Company, and are rewarded with prizes or trips for their efforts in generating new subscribers. (Pet. App. A-42). When the Company extends "money back guarantees" to new subscribers, it is the Company and not the carrier that bears this financial obligation. (Pet. App. A-42). Although carriers are billed even in the event of non-delivery for all newspapers ordered, the Company supplies carriers with substitute copies at no cost for all papers that are damaged or lost for any reason. (Pet. App. A-43).

The Company pays a portion of the premium for a carrier's accident insurance if a carrier requests such coverage. (Pet. App. A-43). In accordance with express statutory exemptions under federal and state law, the Company does not deduct Social Security or income taxes from carrier paychecks.[2] (Pet. App. A-43).

Carriers have no proprietary interest in their routes. (Pet. App. A-43). The Company provides carriers with collection cards, routebooks and newspaper delivery tubes in which the carriers are required to deposit the newspapers they deliver. (Pet. App. A-43). Suburban carriers receive a vehicle allowance which is determined by the district manager on the basis of the mileage covered along a particular route. (Pet. App. A-43). This mileage determination is made by the district manager while accompanying the carrier on his route. (Pet. App. A-43).

---

[2] *See* 26 U.S.C. § 3121(b)(14)(A) and (B); 26 U.S.C. § 3306 (c)(15)(A) and (B); M.C.L.A. § 141.606; M.C.L.A. § 421.43(p).

The district manager "sees to it that the carriers perform their duties properly." (Pet. App. A-43). District managers instruct newly hired carriers with respect to delivery method, collections and participation in promotional campaigns. (Pet. App. A-43). Thereafter, the district managers monitor the various aspects of the carriers' performance, and approximately 30 percent of them require special attention. (Pet. App. A-43-A-44). District managers closely monitor the carriers with regard to collections and will accompany a carrier to the home of a delinquent subscriber to assist in clearing up the arrearage. (Pet. App. A-44).

District managers respond to subscriber complaints concerning poor service or litter at bundle drop locations by speaking with the carrier and telephoning or visiting the subscriber. (Pet. App. A-44). District managers also handle carrier complaints regarding subscribers. (Pet. App. A-44).

Carriers are expected to provide substitutes that must be satisfactory to the district manager and the latter is ultimately responsible for securing a suitable substitute when the carrier fails to do so. (Pet. App. A-44). If the substitute is inexperienced, the district managers provide instruction pertaining to "the rules regarding proper delivery and collections." (Pet. App. A-44).

The district managers have the discretion to split, consolidate and establish the boundaries of routes. (Pet. App. A-44). District managers also transfer carriers among different routes and recommend carriers for special recognition and eligibility in a paid scholarship program sponsored by the Company. (Pet. App. A-44). District managers also are empowered to make carrier firing decisions. (Pet. App. A-44-A-45).

B. Course of Proceedings

The protracted history of this case began on January 5, 1977, when Administrative Law Judge ("ALJ") James L. Rose issued a decision—subsequently affirmed

by the Board in a decision dated May 6, 1977—which failed to classify the newspaper carriers as either employees or independent contractors. While admitting that the newspaper carriers were not independent contractors, Judge Rose ruled that the newspaper carriers were "not employees" as a "matter of policy." (Pet. App. A-26). Since the district managers must supervise "other employees" to meet the statutory definition of a supervisor, Judge Rose ruled that the district managers were not supervisors under the Act. Judge Rose's invention of a mysterious and unexplicated policy was a radical departure from Board precedent which has always classified newspaper carriers as either employees or independent contractors under traditional common law agency concepts.

The Company petitioned the United States Court of Appeals for the Sixth Circuit to review and set aside the Board's ruling. The Board filed a cross-application for enforcement of that ruling. The Sixth Circuit denied the Board's enforcement application and granted the Company's petition on October 4, 1979. (Pet. App. A-6-A-14). The court clearly was alarmed by the Board's departure from its prescribed jurisdictional authority under the Act, and refused to sanction the Board's "policy" judgment—which, in essence, amounted to an administrative redrafting of Sections 2(3) and 2(11) of the Act. *See* 29 U.S.C. §§ 152(3), 152(11). It declared:

> We cannot accept the finding that, as a matter of policy, [the Company's carriers] are not employees. Whose policy? *They are entitled to be definitely classified under the statute. Either they are legally employees or, according to law, they are not employees.*

(Pet. App. A-14) (emphasis added). Thus, the court remanded the case to the Board for its determination of the legal status of the Company's carriers under the Act. (Pet. App. A-14).

On remand, the Board rendered a supplemental decision and order in which it determined that the Company's carriers were employees and the Company's district managers were supervisors under the Act. (Pet. App. A-40-A-50). In addressing the threshold question of whether the Company's carriers were employees or independent contractors under the Act, the Board made extensive findings of fact regarding the Company's relationship vis-a-vis its carriers. (Pet. App. A-41-A-45). The Board then applied the traditional "right to control" test in ascertaining the carriers' status as employees under the Act. (Pet. App. A-45).[3] As is invariably the case in these determinations, the Board observed that the Company's relationship with its carriers exhibited characteristics reflective of both an employer-employee relationship and an employer-independent contractor relationship. (Pet. App. A-45-A-47). The Board stressed, however, that the factors indicative of an employer-independent contractor relationship were "clearly outweighed" by those factors which conclusively demonstrated that the relationship between the Company and its carriers was one of employer-employee. (Pet. App. A-46-A-47). Summarizing the evidence before it, the Board held that

> In view of the substantial control by the district managers over the carriers, the absence of the proprietary interest on the part of the carriers, their insulation from most losses, and the limited opportunity for significantly increasing their income, we now reverse our earlier finding and conclude in the light of the Board's more recent Decisions that the

---

[3] Under the "right to control" test as consistently articulated by the Board, "an employer-employee relationship exists when the employer reserves the right to control not only the result to be achieved but also the means to be used in attaining the result." By way of contrast, an independent contractor relationship exists when the employer reserves the right only to control the ultimate result to be achieved. (Pet. App. A-45).

> carriers are employees within the meaning of the Act.

(Pet. App. A-47) (footnote omitted). Moreover, since the Board declared that "[i]t is clear . . . that the district managers hire, discharge, assign, transfer, and responsibly direct the carriers whom we have found to be employees," the district managers were adjudged to be "supervisors" explicitly excluded from the coverage of the Act. (Pet. App. A-47). The Board thus vindicated the Company's position in declining to bargain with the Union representing its district managers. (Pet. App. A-47).

The Union appealed the Board's supplemental decision and order to the Sixth Circuit Court of Appeals. In an opinion issued on June 29, 1982, the Sixth Circuit affirmed, stating that "there is no question but that the [Board's determination that the carriers were employees and the district managers supervisors] does have substantial support" in the record as a whole. (Pet. App. A-16). The court, however, remanded the case back to the Board for "the limited purpose" of ascertaining whether principles of equitable estoppel could be invoked to preclude the Company from maintaining that its carriers were employees and its district managers supervisors under the Act. (Pet. App. A-18, A-3). Circuit Judge Boyce F. Martin, Jr. dissented from the court's remand order, however, since in his opinion he "d[id] not feel that there is any evidence whatsoever that equitable estoppel may be claimed by the [Union]." (Pet. App. A-19).

Judge Martin's dissent proved prophetic. In a second supplemental decision issued on February 7, 1983, the Board unanimously rejected the Union's equitable estoppel claim. (Pet. App. A-51-A-55). On appeal before the Sixth Circuit, the Union's equitable estoppel claim met an identical fate. (Pet. App. A-1-A-5). The Union next petitioned the Sixth Circuit for a rehearing and suggested a rehearing *en banc* regarding the specific issue

upon which the Union presently seeks review before this Court. Significantly, not a single judge in active service with the Sixth Circuit moved for rehearing *en banc*, and the court summarily denied the Union's petition. (Pet. App. A-58).

SUMMARY OF ARGUMENT

The decision below of the National Labor Relations Board, enforced by the Sixth Circuit Court of Appeals, that the Company's newspaper carriers are "employees" and that the Company's district managers are "supervisors" expressly excluded from coverage under the National Labor Relations Act has warrant in the record and a reasonable basis in law. Petitioner is seeking an invitation to re-litigate before this Court an issue which has been exhaustively investigated and correctly decided by the Board and the Sixth Circuit on the basis of a voluminous record generated by seven years of fact-finding and litigation. The invitation should be withheld.

This case is completely unremarkable and does not merit this Court's review. It involves the Board's application of well-established agency principles to a discrete fact situation and hence will affect few—if any—other litigants. Indeed, a plethora of newspaper carrier cases addressing the same basic issue upon which the Petitioner seeks review before this Court invariably have underscored the ad hoc nature of its resolution.

Petitioner's assertion of an implied exclusion for newspaper carriers is unsound and conflicts with Congressional intent and well-settled rules of statutory construction. Congress, in defining the term "employee" in Section 2(3) of the Act, established six explicit exclusions from that definition. Conspicuously absent from this list is any exclusion for "newspaper carriers." It is telling that Congress has exhibited its ability to draft a newspaper carrier exemption to federal labor legislation when it has chosen to do so. *See* Section 13(d) of the Fair Labor Standards Act.

Lastly, the rulings below that the district managers are statutory supervisors are completely in accord with Congressional intent and long-standing Board and judicial authority. This Court has proclaimed that Congress' intention in enacting Section 14(a) of the Act was to relieve employers from any compulsion to recognize and bargain with a union of supervisory employees. Consequently, although Section 14(a) specifically permits employers to recognize and bargain with units of supervisors, it unambiguously and categorically removes any legal obligation on behalf of an employer to continue that relationship if undesired.

REASONS FOR DENYING THE WRIT

I. The Decision Below Of The National Labor Relations Board, Enforced By The Sixth Circuit Court Of Appeals, That The Company's Newspaper Carriers Are "Employees" And That The Company's District Managers Are "Supervisors" Expressly Excluded From Coverage Under The National Labor Relations Act Has Warrant In The Record And A Reasonable Basis In Law.

This Court long has underscored the deference that should attach to a Board's determination that certain workers are "employees" under the Act. Specifically, this Court has admonished the courts of appeals that Board judgments in this regard should be honored so long as they have warrant in the record as a whole and a reasonable basis in law. *E.g., Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298, 303-04 & n.14 (1977); *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166 (1971); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944). Moreover, when a Board decision grounded in its construction of the Act has garnered the approval of the reviewing court of appeals, the prudence of this Court's reluctance to intercede obviously waxes even more compelling. *See, e.g., Beth Israel Hospital v. NLRB*, 437 U.S. 483, 507 (1978); *Golden*

State Bottling Co., Inc. v. NLRB, 414 U.S. 168, 172-73 (1973); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951).

In the instant case, Petitioner is seeking to litigate anew in this forum an issue which has been fully explored and correctly decided by the Board and Sixth Circuit on the basis of an exhaustive record borne of seven years of fact-finding and litigation. Petitioner has failed to advance any persuasive reasons that would justify this Court's grant of certiorari in the instant case.

A. *This case is unremarkable since it involves the Board's application of well-established agency principles to a very particularized fact situation and hence will affect few, if any, other litigants.*

Section 2(3) of the Act, 29 U.S.C. 152(3), explicitly excludes "any individual having the status of an independent contractor" from the definition of "employee" under the Act.[4] This explicit displacement of independent contractors from the scope of the Act was undertaken in the 1947 Taft-Hartley amendments to the Act which sought, *inter alia*, to legislatively override an expansive formulation of the term "employee" that had been developed by the Board and sanctioned by the Supreme Court

[4] 29 U.S.C. § 152(3) provides in full that "[t]he term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944). *See, e.g., Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166-67 (1971); *NLRB v. United Insurance Co.*, 390 U.S. 254, 256 (1968).

Although the pre-1947 definition of "employee" was devoid of the explicit independent contractor exclusion, the Board historically had placed independent contractors beyond the purview of the Act and had relied principally upon the common law "right to control" test to distinguish employees from independent contractors. *See, e.g., Klement Timber Co.*, 59 N.L.R.B. 681 (1944); *Field Packing Co.*, 48 N.L.R.B. 850 (1943). In *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), however, the Board embraced a more aggressive, policy-oriented test for ascertaining "employee" relationships under the Act and thus relegated the traditional common law "right to control" test to step-child status. There the Board found newsboys distributing newspapers on street corners to be the "employees" of various newspaper publishers purely on the basis of policy considerations. Specifically, the Board had concluded that the relationship between the newsboys and the publishers exhibited sufficient economic dependence to warrant extending the Act's protections to these newsboys. The Ninth Circuit Court of Appeals denied enforcement of the Board's ruling, however, holding that Congress had intended for the term "employee" to be "given its conventional meaning as developed under the common law and statutory enactments," i.e., in accordance with the "right to control" test utilized by the Supreme Court in determining "employee" status under various other federal statutes. *Hearst Publications, Inc. v. NLRB*, 136 F.2d 608, 612-13 (9th Cir. 1943). The court explained:

> Such a result is in accord with the basic theory of statutory interpretation that the legislature is presumed to use words in their ordinary sense unless

> that sense is contradicted by the context of the statute. Since the principle is a long established one, it would seem that if Congress had intended to enlarge upon the common meaning of "employee," it would have specifically so stated in the Act, which sets out specific definitions to several terms used in the Act.

Id. at 612 (citations omitted). Utilizing the traditional common law "right to control" test, the court held that the evidence in the record was insufficient to support the Board's ruling that the newsboys were "employees" of the publishers under the Act. *Id.* at 613-14.

The Supreme Court reversed the Ninth Circuit's holding and reinstated the Board's order. The Court rejected as inappropriate the application of the common law "right to control" test to ascertain coverage under national labor legislation, and announced instead that the definition of "employee" under the Act must be distilled "from the history, terms and purposes of the legislation." 322 U.S. 111, 124. The Court stated that, in individual cases, the concept of "employee" must be referenced to the actual economic relationship of the parties in light of the Act's purpose and that "[w]here all the conditions of the relation require protection, protection ought to be given." *Id.* at 129 (citation omitted). The Court deemed it unnecessary to formulate a precise definition of "employee" that would control in future cases, however, reasoning that such a task would be best suited for Board resolution on the basis of its amassed expertise. *Id.* at 130.[5]

Congressional reaction to the *Hearst* decision was swift and vehement. In the Taft-Hartley amendments of 1947,

---

[5] Justice Roberts authored the lone dissenting opinion which, in light of subsequent legislative events, carries particular significance. Justice Roberts essentially espoused the position reflected in the Ninth Circuit's majority opinion below, declaring that it was "[c]lear [that] Congress did not delegate to the National Labor Relations Board the function of defining the relationship of employment so as to promote what the Board understood to be the underlying purpose of the statute." 322 U.S. at 135-36.

Congress legislated against what it perceived to be "a disregard by the Board of the clear statutory language and an abdication by the Court of its functions in reviewing Board decisions." R. Gorman, *Basic Text on Labor Law*, at 29 (1977). By enacting an amendment explicitly excluding "any individual having the status of an independent contractor" from the definition of "employee" in Section 2(3) of the Act, Congress "thereby imported the common law 'right to control' test as a standard of statutory coverage." *Id.* As this Court acknowledged in *NLRB v. United Insurance Co.*, 390 U.S. 254, 256 (1968), "[t]he obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act." [6] Unquestionably, then, the operative

---

[6] The House Report on the amendment which ultimately was enacted to expressly exclude "independent contractors" from the scope of Section 2(3)'s definition of "employee" provided:

> An "employee," according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. But in the case of *National Labor Relations Board v. Hearst Publications, Inc.* (322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170 (1944)), the Board expanded the definition of the term "employee" beyond anything that it ever had included before, and the Supreme Court, relying upon the theoretic "expertness" of the Board, upheld the Board. In this case the Board held independent merchants who bought newspapers from the publisher and hired people to sell them to be 'employees." The people the merchants hired to sell the papers were "employees" of the merchants, but holding the merchants to be "employees" of the publisher of the papers was most far reaching. *It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. In the law, there always has been a difference, and a big difference, between "employees" and "independent contractors." "Employees" work for wages or salaries under direct supervision. "Independent contractors" undertake*

standard to be employed in distinguishing employees and independent contractors under the Act is the traditional "right to control" test borne of common law agency principles. Congress has spoken very clearly on this score, and the message obviously has been received by this Court, the Board and the various circuit courts of appeals.[7]

---

*to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits. * * * To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes "independent contrators" from the definition of "employee."*

H.R. Rep. No. 245, 80th Cong., 1st Sess., 18 (1947) (emphasis added).

[7] *See, e.g., NLRB v. United Insurance Co.*, 390 U.S. 254 (1968); *Broadway Cab Cooperative, Inc. v. Teamsters & Chauffeurs Local Union No. 281, IBT*, 710 F.2d 1379, 1381 (9th Cir. 1983); *NLRB v. Associated Diamond Cabs, Inc.*, 702 F.2d 912, 918-19 (11th Cir. 1983); *Hilton International Co. v. NLRB*, 690 F.2d 318, 320 (2d Cir. 1982); *Air Transit, Inc. v. NLRB*, 679 F.2d 1095, 1098 (4th Cir. 1982); *St. Charles Journal, Inc. v. NLRB*, 679 F.2d 759, 760 (8th Cir. 1982) (newspaper carrier case; "[i]t is well settled that 'the distinction between employees and independent contractors must be made by the application of general agency principles on a case-by-case basis.' ") (citations omitted); *Building Material and Dump Truck Drivers v. NLRB*, 669 F.2d 759, 764 (D.C. Cir. 1981); *NLRB v. Amber Delivery Service, Inc.*, 651 F.2d 57, 60 (1st Cir. 1981) ("It is well-established that general principles of agency law govern the distinction between employee and independent contractor for purposes of the Act.") (citations omitted); *NLRB v. Tri-State Transport Corp.*, 649 F.2d 993, 994 (4th Cir. 1981); *NLRB v. A. Duie Pyle, Inc.*, 606 F.2d 379, 382 (3d Cir. 1979); *Seven-Up Bottling Co. v. NLRB*, 506 F.2d 596, 597 (1st Cir. 1974) ("It is settled that the Board and courts are to apply general principles of agency law in distinguishing employees from independent contractors. In 1947 Congress passed an amendment to the Act specifically excluding independent contractors from the definition of 'employee' so that determinations on this question would be based on ordinary tests of the common law rather than on the Board's

Under the "right to control" test, there is no talismanic formula that can be relied upon to differentiate employees from independent contractors. Rather, there is a multi-faceted inquiry undertaken into all aspects of the parties' relationship and "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles." *NLRB v. United Insurance Co.*, 390 U.S. at 258. Characteristically, analysis of such relationships will reveal factors reflective of both employee and independent contractor status and a balancing process will be employed to resolve the issue—as was done in the instant case. *The Oakland Press Co.*, 249 N.L.R.B. 1081 (1980) (Pet. App. A-40-A-47). *Accord, Abell Publishing Co.*, 270 N.L.R.B. No. 181, 116 L.R.R.M. 1284, 1286 (1984); *Fort Wayne Newspapers, Inc.*, 263 N.L.R.B. 854, 855 (1982); *Philadelphia Newspapers, Inc.*, 238 N.L.R.B. 835, 836 (1978).

Consequently, it is not surprising that "[i]n past cases involving the newspaper industry, the resolution of the question of whether carriers are employees or independent contractors has turned on the specific facts in each case." *Philadelphia Newspapers, Inc.*, 238 N.L.R.B. 835, 836 (1978).[8] Depending upon the peculiarities of the re-

---

view of policy considerations embodied in the Act.") (citations omitted); *NLRB v. Deaton, Inc.*, 502 F.2d 1227 (5th Cir. 1974), *cert. denied*, 422 U.S. 1047 (1975); *Ace Doran Hauling & Rigging Co. v. NLRB*, 462 F.2d 190, 193 (6th Cir. 1972); *NLRB v. Pepsi Cola Bottling Co.*, 455 F.2d 1134, 1137 (6th Cir. 1972); *Meyer Dairy, Inc. v. NLRB*, 429 F.2d 697, 701 (10th Cir. 1970); *Fort Wayne Newspapers, Inc.*, 263 N.L.R.B. 854, 855 (1982); *The Herald Star, Canton Division, Thomson Newspapers, Inc.*, 227 N.L.R.B. 505, 507 (1976); *El Mundo, Inc.*, 167 N.L.R.B. 760, 761 (1967).

[8] *Accord, Brown v. NLRB*, 462 F.2d 699, 702 (9th Cir.), *cert. denied*, 409 U.S. 1008 (1972) ("Since the facts in each case are largely determinative, the Board's rulings in comparable newspaper dealer cases are not uniform."); *NLRB v. Brush-Moore News-*

lationship between a newspaper publisher and the individuals who distribute its newspaper, the courts and the Board have determined that newspaper distributors/carriers have been employees in some cases,[9] and independent contractors in others.[10] Thus, the instant case merely represents one decision among a plethora of cases addressing the employee vs. independent contractor status

---

papers, Inc., 413 F.2d 809, 812 (6th Cir. 1969); *NLRB v. A. S. Abell Co.*, 327 F.2d 1, 4-5 (4th Cir. 1964); *Abell Publishing Co.*, 270 N.L.R.B. No. 181, 116 L.R.R.M. 1284, 1286 (1984).

[9] *E.g., St. Charles Journal, Inc. v. NLRB*, 679 F.2d 759 (8th Cir. 1982); *News Journal Co. v. NLRB*, 447 F.2d 65 (3d Cir. 1971); *Herald Co. v. NLRB*, 444 F.2d 430 (2d Cir. 1971); *NLRB v. Brush-Moore Newspapers, Inc.*, 413 F.2d 809 (6th Cir. 1969); *NLRB v. Lindsay Newspapers, Inc.*, 315 F.2d 709 (5th Cir. 1963); *Drukker Communications, Inc.*, 258 N.L.R.B. 734, 744-46 (1981); *The Virginian Pilot/Ledger Star, Capital Division of Landmark Communications, Inc.*, 241 N.L.R.B. 575 (1979); *Philadelphia Newspapers, Inc.*, 238 N.L.R.B. 835 (1978); *The Herald Star, Canton Division, Thomson Newspapers*, 227 N.L.R.B. 505, 506-07 (1976); *Federated Publications, Inc.*, 218 N.L.R.B. 151 (1975); *Beacon Journal Publishing Co.*, 188 N.L.R.B. 218 (1971); *The News-Journal Co.*, 180 N.L.R.B. 864 (1970); *San Antonio Light Division, The Hearst Corp.*, 174 N.L.R.B. 934 (1969) (*San Antonio III*); *El Mundo, Inc.*, 167 N.L.R.B. 760 (1967); *News Syndicate Co., Inc.*, 164 N.L.R.B. 422 (1967); *San Antonio Light Division, The Hearst Corp.*, 167 N.L.R.B. 689 (1967) (*San Antonio II*); *The Sacramento Union*, 160 N.L.R.B. 1515 (1966); *Eureka Newspapers, Inc.*, 154 N.L.R.B. 1181 (1965); *The Vindicator Printing Co.*, 146 N.L.R.B. 871 (1964); *San Antonio Light Division, The Hearst Corp.*, 130 N.L.R.B. 619 (1961) (*San Antonio I*); *Buffalo Courier-Express, Inc.*, 129 N.L.R.B. 932 (1960); *P.G. Publishing Co.*, 114 N.L.R.B. 60 (1955).

[10] *E.g., Brown v. NLRB*, 462 F.2d 699 (9th Cir.), *cert. denied*, 409 U.S. 1008 (1972); *NLRB v. A. S. Abell Co.*, 327 F.2d 1 (4th Cir. 1964); *Abell Publishing Co.*, 270 N.L.R.B. No. 181 (1984); *Fort Wayne Newspapers, Inc.*, 263 N.L.R.B. 854 (1982); *Donrey, Inc.*, 223 N.L.R.B. 744 (1976); *Las Vegas Sun, Inc.*, 219 N.L.R.B. 889 (1975); *Stockton Daily Record*, 71 L.R.R.M. 1613 (Reg. Dir., 20th Reg., 1969); *The Pulitzer Publishing Co.*, 146 N.L.R.B. 302 (1964); *Carter Publications, Inc.*, 100 N.L.R.B. 599 (1952); *The Times Herald Printing Co.*, 94 N.L.R.B. 1785 (1951); *The Kansas City Star Co.*, 76 N.L.R.B. 384 (1948).

of newspaper distribution personnel that invariably have been premised upon an ad hoc assessment of the particularized facts of the purported employment relationship in question. As such, the case is unremarkable and does not warrant review by this Court.

B. *Petitioner's assertion of an implied exclusion for newspaper carriers is meritless and flies in the face of Congressional intent and well-settled rules of statutory construction.*

Section 2(3) of the Act, in defining the term "employee," expressly excludes from that definition the following classes of workers: (1) "agricultural laborer[s]"; (2) persons employed "in the domestic service of any family or person at his home"; (3) "any individual employed by his parent or spouse"; (4) "any individual having the status of an independent contractor"; (5) "any individual employed as a supervisor"; and (6) "any individual employed by an employer subject to the Railway Labor Act. . . ." 29 U.S.C. § 152(3). Conspicuously absent from this list is an exclusion for "newspaper carriers." This is telling, for it is well-settled that when Congress explicitly enumerates certain exceptions to a general definition, additional exceptions are not to be implied in the absence of clear legislative intent to the contrary. *See, e.g., American Bank & Trust Co. v. Dallas County*, —— U.S. ——, 103 S. Ct. 3369, 3375 (1983); *Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-17 (1980). *See also Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("Absent a clearly expressed legislative intention to the contrary, [the statutory] language must ordinarily be regarded as conclusive."). Although Petitioner seeks to persuade this Court to recognize an additional implied exclusion from Section 2(3)'s definition of "employee" for "newspaper carriers," it cites absolutely no legislative history to support such a radical alteration of the unambiguous language of the Act. Given this deficiency in Petitioner's

position, it appears appropriate to observe that "[t]he short answer is that Congress did not write the statute that way." *Russello v. United States*, —— U.S. ——, 104 S. Ct. 296, 300 (1983); *United States v. Naftalin*, 441 U.S. 768, 773 (1982).

The untenability of Petitioner's position is further exposed when one considers the context in which Congress amended Section 2(3) of the Act in 1947 to expressly exclude "independent contractor[s]." As noted earlier, Congress' action in enacting an explicit "independent contractor" exclusion from Section 2(3) was prompted by its strong denunciation of this Court's decision in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944). There the Court had permitted the Board to stray from traditional common law agency principles in determining "employee" status under the Act and to rely instead upon amorphous conceptions of "policy." Congress responded swiftly by amending Section 2(3) to expressly exclude "independent contractor[s]" from the definition of "employee" and there can be no disputing that "[t]he obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act." *NLRB v. United Insurance Co.*, 390 U.S. 254, 256 (1968). It is revealing indeed that Congress, in legislatively overriding the holding in *Hearst—a case directly addressing the legal status under the Act of newspaper distributors*—chose not to accomplish its purpose by explicitly excluding "newsboys" or "newspaper distributors" from the coverage of the Act, but instead chose to reaffirm the pre-eminent role of common law agency principles in distinguishing covered "employees" from uncovered "independent contractors." Furthermore, it is apparent that Congress was well aware of how to draft a newspaper distributor exemption to federal labor legislation when it chose to do so. *See* Section 13(d) of the Fair Labor Standards Act, 29 U.S.C § 213(d) ("The

provisions of sections 206, 207, and 212 of this title [pertaining to minimum wage, overtime and child labor restrictions, respectively] shall not apply with respect to any employee engaged in the delivery of newspapers to the consumer. . . .").

Petitioner relies principally upon two cases, *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981) and *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), for the proposition that newspaper carriers are entitled to an implicit exclusion from the definition of "employee" in Section 2(3). Far from "controlling" the instant case as Petitioner contends (Pet. 11), neither case substantively supports Petitioner's position. In *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981), this Court affirmed, as having a reasonable basis in law, the Board-created doctrine of excluding confidential employees with a "labor-nexus" from employee bargaining units. And, in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), this Court held simply that all employees properly classifiable as "managerial" were intended by Congress to be excluded from the definition of "employee" in Section 2(3). In both cases, this Court underscored the fact that its holdings were grounded in long-standing Board interpretations of the Act and compelled by Congressional intent as embodied in legislative histories.

By way of contrast, the long-standing Board approach to the newspaper carrier employee vs. independent contractor issue has been predicated upon a case-by-case adjudicatory process reliant upon common law agency principles. More fundamentally, the pertinent legislative history in the instant case unambiguously repels the contention that the common law agency principles which Congress intended would govern the employee vs. independent contractor question should be supplanted in the newspaper distribution context by an implicit statutory exclusion for newspapers carriers. It is telling that Peti-

tioner has failed to cite even one reference to Section 2(3)'s legislative history in support of its position.

II. The Rulings Below That The District Managers Are Statutory Supervisors Are Completely Consistent With Congressional Intent And Long-standing Board And Judicial Authority.

Section 2(3) expressly excludes from the statutory definition of "employee" ". . . any individual employed as a supervisor. . . ." 29 U.S.C. § 152(3). Moreover, Section 14(a) of the Act categorically proclaims that

> . . . no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees *for the purpose of any law, either national or local, relating to collective bargaining.*

29 U.S.C. § 164(a) (emphasis added). This Court, in analyzing the significance of Section 14(a) in *Hanna Mining Co. v. District 2, Marine Engineers Beneficial Association*, 382 U.S. 181, 189 (1965), concluded that its legislative history[11] reflected clearly that "Congress' propelling intention was to relieve employers from *any* compulsion under the Act and under state law to countenance or bargain with any union of supervisory employees." (emphasis added).[12]

---

[11] *See, e.g.*, S. Rep. No. 105, 80th Cong., 1st Sess., at 19 (1947) (Section 14(a) "prevents[s] employers [from] being compelled to accord supervisors the anomalous status of employees for the purposes of the Wagner Act."); H.R. Rep. No. 245, 80th Cong., 1st Sess., at 5, 14 (Section 14(a) "exempts supervisors from the compulsory features of the National Labor Relations Act.") ("The bill, by excluding foremen and other supervisory personnel from the definition of 'employee,' deprives the Board of jurisdiction over them."); *see also* comments of Senator Taft, co-author of the Act, on the operative impact of Section 14(a): "[Supervisors] do not have the protection of the National Labor Relations Act." 93 Cong. Rec. 3952 (1947).

[12] *Accord, Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 918 (3d Cir. 1981); *District 2, Marine Engineers Beneficial Association*

Although Petitioner maintains that permitting an employer to upset an established bargaining relationship by challenging the legal status of that bargaining unit under the Act will unleash a parade of horribles debilitative of industrial stability, such a complaint—speculative at best—should be directed to Congress and not this Court. As written, *although Section 14(a) of the Act specifically permits employers to recognize and bargain with units of supervisors, it unambiguously and categorically removes any legal obligation on behalf of an employer to continue that relationship if undesired.* Thus, if the Company is to be denied the exercise of a statutorily granted freedom, such denial must originate with Congress through the amendment of Section 14(a). Additionally, it would be perverse indeed to now penalize the Company for simply having participated in permissive bargaining with the Petitioner over a six-year period since the Company's course of conduct enabled the Union to receive dues monies from the district managers for several years—thereby conferring upon the Union tangible benefits to which it had no statutory right. *See The Oakland Press Co.*, 266 N.L.R.B. 107, 108 (1983) ("As a result, the Union and its members benefitted from [the Company's] willingness, despite the lack of Board approval or certification, to enter into and until May, 1976 abide by collective bargaining agreements which covered the district managers.").

Moreover, it remains a firmly established tenet of labor law that the determination of whether an individual occupies a particular status under the Act is predicated upon an evaluation of whether that individual satisfies certain prescribed legal criteria under the Act, and an employer's past characterization of that individual's status necessarily is subordinated in significance to the dictates

---

v. Amoco Oil Co., 554 F.2d 774, 778 (6th Cir. 1977); *Warner Co. v. NLRB*, 365 F.2d 435, 437 (3d Cir. 1966); *NLRB v. City Yellow Cab Co.*, 344 F.2d 575, 578 (6th Cir. 1965).

of the Act.[13] Accordingly, the Board historically has held that a pre-election agreement wherein, as here, an employer stipulated that certain workers were not "supervisors" does not preclude the employer from successfully contesting their status or inclusion in a bargaining unit at a subsequent date when continued inclusion of these workers in the unit would contravene the Act.[14] Moreover, it should be emphasized that the Board has maintained a strict fidelity to the above principle in cases in which bargaining histories of the affected units have been lengthy and the work duties of the individuals ultimately excluded have been unchanged. Indeed, in a recent newspaper unit clarification case reflecting a similar factual backdrop, the Board held that notwithstanding the fact that the employer and union had long recognized certain positions as properly includible within the bargaining unit and that the job responsibilities of the workers occupying these positions had not been altered, the Board was compelled to exclude from the unit as supervisors various positions since continued inclusion in the unit would violate fundamental policies of the Act. The Board's reasoning, excerpted below in pertinent part and reflecting solidly grounded legal principles, likewise controls the disposition of the instant case:

> The Act provides specifically for the exclusion of "supervisors." * * * Thus, except in certain limited

---

[13] *See, e.g., NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 290 n.19 (1974); *NLRB v. St. Mary's Home, Inc.*, 690 F.2d 1062, 1066 (4th Cir. 1982); *NLRB v. Wilson-Crissman Cadillac*, 654 F.2d 728, 730 (6th Cir. 1981); *Walla Walla Union Bulletin v. NLRB*, 631 F.2d 609, 613 (9th Cir. 1980); *Phillips v. Kennedy*, 542 F.2d 52, 55 (8th Cir. 1976); *Mid-Continent Refrigerated Service Co.*, 228 N.L.R.B. 917, 920 (1977).

[14] *The Oakland Press Co.*, 266 N.L.R.B. 107, 108 (1983); *Esten Dyeing & Finishing Co., Inc.*, 219 N.L.R.B. 286 (1975); *Fisher-New Center Co.*, 184 N.L.R.B. 809 (1970); *Times-World Corp.*, 151 N.L.R.B. 947 (1965); *Lake Huron Broadcasting Corp.*, 130 N.L.R.B. 908 (1961).

> and well-defined factual situations, the Board, when presented with an appropriate petition or claim, is required to exclude positions from a bargaining unit where the inclusion of those positions would violate the principles of the Act. *While it may be that certain of the positions sought to be excluded have long been included under previous contracts, and the job duties of those positions have remained unchanged, nonetheless, if it can be shown that the persons in such positions meet the test for establishing supervisory . . . status, we are compelled to exclude them.*

Washington Post Company, 254 N.L.R.B. 168, 169 (1981) (emphasis added; footnotes omitted).[15]

---

[15] The Board in *Washington Post Company* cites as illustrative authority for its above ruling the case of *Brotherhood of Locomotive Firemen and Engineers*, 145 N.L.R.B. 1521 (1964). In that case, employees that had been recognized as occupying unit positions for over forty years by the parties and whose job responsibilities had not been modified significantly during that period were sought to be excluded as supervisors by the employer. The union argued for denial of the exclusion requests on the ground that the parties' lengthy collective bargaining history barred subsequent restructuring of the unit. The Board was unpersuaded; it held that although "in certain circumstances when determining the scope of the appropriate unit weight is given to bargaining history and to the prior agreements of the parties such factors are not determinative of the status of disputed employee categories whose exclusion may be required because of the statute or for policy reasons." 145 N.L.R.B. at 1525 n. 10. *See also The Western Colorado Power Co.*, 190 N.L.R.B. 564 (1971) (30-year bargaining history; employer sought exclusion of 133 employees as supervisors; all but five employees deemed excluded); *A.D.T. Company, Inc.*, 177 N.L.R.B. 704 (1969) (30-year bargaining history; employer sought exclusion of 94 individuals as supervisors; Board excluded district inspectors, foremen and plant supervisors).

CONCLUSION

For the foregoing reasons, Respondent The Oakland Press Company respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

L. MICHAEL ZINSER
KING, BALLOW & LITTLE
First American Center
Nashville, Tennessee 37238
615/259-3456
Counsel for Respondent,
The Oakland Press Company

APPENDIX

At the time the instant suit was filed and through the present, respondent has been, and remains, a Michigan corporation, and a wholly-owned subsidiary of Capital Cities Communications, Inc., of New York.

The following enterprises are operating divisions of Capital Cities Communications, Inc.: WPVI-TV, Philadelphia; WKBW-TV, Buffalo; WTNH-TV, New Haven; WTVD-TV, Durham-Raleigh; KFSN-TV, Fresno; WPAT AM-FM, Paterson, N.J.; KLAC-AM and KLAC-FM, Los Angeles; WJR AM-FM, Detroit; WKBW AM, Buffalo; WPRO AM-FM, Providence; Sutton Industries, Mission Viejo, Cal.; *Albany Democrat-Herald*, Albany, Ore.; *Daily Tidings*, Ashland, Ore.; *Gresham Outlook*, Gresham, Ore.; *Springfield News*, Springfield, Ore.; *Cottage Grove Sentinel*, Cottage Grove, Ore.; *Lebanon Express*, Lebanon, Ore.; *Sandy Post*, Sandy, Ore.; *Stamp Collector* magazine; *Stamp Wholesaler* magazine.

The following companies are subsidiary corporations of Capital Cities Communications, Inc.; where a subsidiary is itself a parent corporation, the name of its subsidiaries are noted parenthetically: Oakland Press Co., Pontiac, Mich.; The Kansas City Star Company, Kansas City, Mo.; Capital Cities of Kansas, Inc. (parent of Pennypower Shopping News, Inc.); Capital Cities Properties, Inc.; Tampa Bay TV (WFTS-TV), Tampa, Fl.; WBAT-KSCS, Inc., Fort Worth, Tex.; KTRK, Inc., Houston, Tex.; Star Telegram, Inc., Fort Worth, Tex.; Institutional Investor, Inc., New York, New York; Securities Data Co., New York, New York; Wilson Publishing Co., Narragansett, Rhode Island; Capital Cities Cable of Albuquerque, Inc. (parent of Sandoval County Cable Television, Inc.); Capital Cities Cable of Ohio, Inc. (parent of Marks Cablevision of Green, Inc.); Capital Cities Cable of Indiana, Inc.; Coastal Bend Cablevision Corp.; Clear Cablevision, Inc.; Omnicom Cablevision of Illinois,

Inc.; Omnicom of Michigan, Inc.; Pacific Cable, Inc.; Capital Cities Cable, Inc. (parent of Cablecom-General, Inc.; Cablecom-General, Inc. is the parent of Tele Hi Fi, Inc. and Mid-Kansas, Inc.).

Capital Cities Media, Inc. is a wholly-owned subsidiary of Capital Cities Communications, Inc. Other operating divisions of Capital Cities Media, Inc. include Fairchild Publications, the Highland (Ill.) Highland News Leader, the Gilford (Conn.) Shore Line Newspapers, and the Belleville (Ill.) *News-Democrat*; Capital Cities Vision, Inc.; the Red Bank (N.J.) *Red Bank Register*, and Toms River (N.J.) Toms River Publishing are wholly-owned subsidiaries of Capital Cities Media, Inc.

No. 84-989 (4)

Office-Supreme Court, U.S.
FILED
FEB 26 1985
ALEXANDER L. STEVAS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

NEWSPAPER DRIVERS AND HANDLERS, LOCAL NO. 372, ETC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND OAKLAND PRESS COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

ROBERT C. BELL, JR.
Attorney

National Labor Relations Board
Washington, D.C. 20570

21 pp

QUESTION PRESENTED

Whether the Board properly applied a right-of-control test in determining that, in the circumstances of this case, certain newspaper carriers are employees within the meaning of the National Labor Relations Act, so that the district managers who direct them are supervisors excluded from the coverage of the Act.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statute involved 2

Statement 2

Argument 7

Conclusion 14

TABLE OF AUTHORITIES

Cases:

Air Transit, Inc. v. *NLRB*, 679 F.2d 1095 8

Allied Chemical Workers v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 ..... 9, 10

Brotherhood of Locomotive Firemen & Enginemen, 145 N.L.R.B. 1521 12

Buffalo Courier Express, Inc., 129 N.L.R.B. 932 12

Cedars-Sinai Medical Center, 223 N.L.R.B. 251 10

Eureka Newspapers, Inc., 154 N.L.R.B. 1181 12

Firmat Mfg. Corp., 255 N.L.R.B. 1213, enforced 97 Lab. Cas. (CCH) ¶ 10,153 10

Kansas City Star Co., 76 N.L.R.B. 384 12

Key Opportunities, Inc., 265 N.L.R.B. 1371 10

Page

Cases—Continued:

Local 777, Democratic Union Organizing Committee v. *NLRB*, 603 F.2d 862 8

Merchants Home Delivery Service, Inc. v. *NLRB*, 580 F.2d 966 8

NLRB v. *A. Duie Pyle, Inc.*, 606 F.2d 379 8

NLRB v. *Associated Diamond Cabs, Inc.*, 702 F.2d 912 8

NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 ..... 9, 10

NLRB v. *Boyer Brothers, Inc.*, 448 F.2d 555, cert. denied, 409 U.S. 878 12

NLRB v. *Hearst Publications, Inc.*, 322 U.S. 111 ..... 8, 9

NLRB v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 ..... 9, 10, 11

NLRB v. *Maine Caterers, Inc.*, 654 F.2d 131, cert. denied, 455 U.S. 940 8

NLRB v. *Montgomery Ward & Co.*, 242 F.2d 497, cert. denied, 355 U.S. 829 12

NLRB v. *Phoenix Mut. Life Ins. Co.*, 167 F.2d 983, cert. denied, 335 U.S. 845 8

NLRB v. *United Insurance Co.*, 390 U.S. 254 8

Newsday, Inc., 171 N.L.R.B. 1456 12

San Antonio Light Division, 130 N.L.R.B. 619 13

Page

Cases—Continued:

San Francisco Art Institute, 226 N.L.R.B. 1251 11

Suburban Newspaper Group, 195 N.L.R.B. 438 12

Universal Camera Corp. v. *N.L.R.B.*, 340 U.S. 474 9

Virginian-Pilot/Ledger Star, 241 N.L.R.B. 575 12

Wallace Corp. v. *NLRB*, 323 U.S. 248 11

Washington Post Co., 254 N.L.R.B. 168 12

Western Colorado Power Co., 190 N.L.R.B. 564 12

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* 2

§ 2(3), 29 U.S.C. 152(3) 2, 8, 9, 11, 13

§ 2(11), 29 U.S.C. 152(11) 2

§ 8(a)(1), 29 U.S.C. 158(a)(1) 5, 6

§ 8(a)(5), 29 U.S.C. 158(a)(5) 3, 5, 6

§ 14(a), 29 U.S.C. 164(a) 2, 11

Miscellaneous:

R. Gorman, *Basic Text in Labor Law* (1977) 8

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-989

NEWSPAPER DRIVERS AND HANDLERS, LOCAL NO. 372, ETC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, AND OAKLAND PRESS COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A6-A14, A15-A19, and A1-A5) are reported at 606 F.2d 689, 682 F.2d 116, and 735 F.2d 969. The decisions and orders of the National Labor Relations Board (Pet. App. A20-A39, A40-A50, and A51-A55) are reported at 229 N.L.R.B. 476, 249 N.L.R.B. 1081, and 266 N.L.R.B. 107.

JURISDICTION

The judgment of the court of appeals (Pet. App. A56-A57) was entered on May 31, 1984. A petition for rehearing was denied on August 15, 1984 (Pet. App. A58). On November 2, 1984, Justice O'Connor extended the time for

filing a petition for a writ of certiorari to and including December 17, 1984 (Pet. App. A59), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are reproduced at Pet. App. A60-A62.

STATEMENT

1. Respondent Oakland Press Company (the Company) publishes a daily afternoon newspaper in suburban Detroit, Michigan. From 1970 to 1976 petitioner (the Union) was the collective bargaining representative of the Company's circulation department district managers, who direct the work of the Company's home delivery newspaper carriers.[1] Upon expiration of the parties' collective bargaining agreement in May 1976, the Company refused to continue bargaining with the Union, claiming that the district managers were supervisors within the meaning of Section 2(11) of the National Labor Relations Act, 29 U.S.C. 152(11). Pet. App. A22-A23, A53. Section 14(a) of the Act, 29 U.S.C. 164(a), provides that no employer shall be compelled to treat

---

[1]In 1970, the Union filed a petition with the Board seeking to represent the district managers. At that time the parties agreed to a consent election without a formal direction of election by the Board's Regional Director. In that agreement the parties stipulated that the newspaper carriers were not "employees" covered by Section 2(3) of the Act, 29 U.S.C. 152(3), and that the district managers therefore were not supervisors, but rather employees entitled to bargain collectively under the Act. Following a hearing, the Regional Director refused to approve the consent agreement and submitted the issue of the status of the carriers to the Board. Before the Board decided that issue, the Union withdrew its petition from the Board, and the parties asked the Michigan Employment Relations Commission to conduct a secret ballot election. After the Union won that election, the State certified the Union as bargaining representative of the district managers. Pet. App. A53.

supervisors as employees for purposes of, inter alia, the requirement that an employer bargain collectively with the representatives of its employees (see 29 U.S.C. 158(a)(5)).

The Company employs approximately 1,250 carriers to deliver papers by foot in local neighborhoods; the foot carriers generally are from 11 to 14 years old, with an average length of service of six months to a year. In addition, there are approximately 35 to 40 adult motor route carriers who service more remote areas. Pet. App. A41, A43. All carriers are directly responsible to one of 15 district managers, who in turn report to one of two zone managers. A circulation manager has overall responsibility for the circulation department. *Id.* at A41.

The Company, through the district managers, instructs and supervises the carriers concerning the proper time, method, and location of delivery, collection from subscribers, and mailing of payments to the Company (Pet. App. A42-A44). Carriers are hired by the district managers, who designate specific routes within their districts and assign a carrier to each. Carriers receive their papers at "drops" designated by the district managers. Pet. App. A41, A43-A44; C.A. App. 84, 154-155.[2] Complaints from subscribers are normally phoned into the circulation department and relayed to the district managers. District managers attempt to resolve complaints directly with subscribers or by instructing carriers on the proper method of delivery. Pet. App. A44; C.A. App. 83, 101. If complaints continue, a district manager may arrange a meeting with the subscriber and carrier to resolve the problem (*id.* at 83). District managers assist carriers in collecting from delinquent subscribers. Except when a subscriber moves, a carrier may not stop delivery without an investigation and authorization by the

---

[2]"C.A. App." refers to the appendix to petitioner's brief in support of its petition to review the Board's first supplemental decision and order.

district manager. At any given time a district manager generally will be required to give special attention to the performance of about 30% of his carriers. Pet. App. A44.

Carriers are expected to provide substitutes satisfactory to the district manager when they are unable to work. However, the district manager has the ultimate responsibility for finding a substitute when the carrier fails to do so. District managers decide whether to split or consolidate routes. They transfer carriers from one route to another and make recommendations concerning which carriers should be cited for excellent performance or deemed eligible for participation in a paid scholarship program. If a district manager concludes that a carrier should not be required to deliver to a particular subscriber because of some hazardous condition, the manager may arrange an alternative means for delivery. Pet. App. A44; C.A. App. 158-159. District managers have the authority to decide, in consultation with their own supervisors, whether to terminate carriers who perform their duties in an unsatisfactory manner (Pet. App. A44-A45).

2. Following the Company's refusal to bargain, the Union filed an unfair labor practice charge with the Board. In its initial decision (Pet. App. A20-A39) the Board concluded that the carriers who deliver the Company's newspapers were not "employees" under the Act and that the district managers who supervise the carriers therefore were employees rather than statutory supervisors because they exercised no supervisory authority over employees.[3] However, the Board declined to decide whether the carriers were

---

[3]The Board stated that, although "[i]t is difficult to conceive that [carriers] * * * are entrepreneurs in the traditional sense of an independent contractor," carriers should not, "as a matter of policy," be considered employees under the Act in light of the "minimal" nature of the work and the fact that the Company "has always treated [them] as

in fact independent contractors (*id.* at A25). The Board concluded that the Company violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with the Union in its capacity as the collective bargaining representative of the district managers. Pet. App. A20-A21, A27, A35-36.

3. The court of appeals declined to enforce the portion of the Board's order relating to the district managers (Pet. App. A6-A14). The court stated that "[t]he record clearly indicates" that the district managers possess and exercise supervisory authority over the carriers and that "[t]he determinative factor" with respect to whether the managers are employees or supervisors "is whether the paper carriers are employees * * * or are independent contractors" (*id.* at A12-A13). The court concluded that the Board erred in failing to determine the status of the carriers under Section 2(3) of the Act, 29 U.S.C. 152(3). The court therefore remanded for determination of the status of the carriers. Pet. App. A14.

4. On remand the Board concluded that the carriers are employees and that the district managers are therefore supervisors within the meaning of the Act (Pet. App. A40-A50). The Board applied the right-of-control test, under which "an employer-employee relationship exists when the

---

nonemployees" (Pet. App. A26). The Board relied on the facts that the Company does not withhold social security and other taxes from the carriers' paychecks, that until 1973 carriers were required to post a $10 bond for their route, and that in the 1970 consent election agreement (see note 1, *supra*) the Company stipulated that carriers were nonemployees (*ibid.*).

The Board also found that the Company had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with petitioner in its capacity as representative of a unit of circulation department truckdrivers and city dealer drivers and ordered the Company to bargain (Pet. App. A24, A27-A34). That portion of the Board's order, which was enforced by the court of appeals (*id.* at A7-A11), is not at issue here.

employer reserves the right to control not only the result to be achieved but also the means to be used in attaining the result" (*id.* at A45). Although some factors pointed toward an independent contractor status for the carriers, the Board concluded that those factors were "clearly outweighed by * * * factors which, notwithstanding the characterization of the carriers in the route agreement as 'independent,' demonstrate their employee status" (*id.* at A46). The Board concluded that, "[i]n view of the substantial control by the district managers over the carriers, the absence of the proprietary interest on the part of the carriers, their insulation from most losses, and the limited opportunity for significantly increasing their income," the carriers must be classified as employees (*id.* at A47). The Board found further that the district managers "hire, discharge, assign, transfer, and responsibly direct the carriers" and are therefore supervisors under the Act. The Board therefore withdrew its finding that the Company violated Section 8(a)(5) and (1) by refusing to bargain with the Union in its capacity as representative of the district managers. Pet. App. A47.

5. The court of appeals concluded that the Board's finding that the carriers are employees and the district managers supervisors under the Act was supported by substantial evidence (Pet. App. A15-A19). However, the court again remanded the case to the Board for consideration of petitioner's contention that the Company should be equitably estopped from asserting that the carriers are employees and the district managers supervisors on the ground that it was "inconsistent with its past conduct and representations" (*id.* at A18).

6. On remand, the Board rejected petitioner's contention that the Company was equitably estopped (Pet. App. A51-A55). The Board held that neither the Company's stipulation in the 1970 consent election agreement submitted to the Board (see note 1, *supra*), petitioner's certification by

the State of Michigan, nor the parties' prior collective bargaining relationship precluded the Company from contesting the status of the district managers, "because unit inclusion of individuals who are shown to be statutory supervisors would without question contravene the Act" (*id.* at A54 (footnote omitted)). The Board also concluded that even if equitable estoppel principles could be applied, the detriment to petitioner, in the form of the Company's refusal to continue recognizing petitioner as bargaining representative of the district managers, was not attributable to any misleading conduct on the part of the Company. The Board noted that petitioner had been aware that there was a question concerning the status of the carriers and district managers from the time the Regional Director rejected the 1970 consent election agreement (see note 1, *supra*). *Id.* at A55.

7. The court of appeals enforced the Board's order (Pet. App. A1-A5). The court agreed with the Board that the Company's prior conduct could not determine the proper classification of the carriers or district managers under the Act and that application of equitable estoppel in this case would frustrate a fundamental purpose of the Act, *i.e.*, not requiring employers to bargain collectively with workers who are connected with management (*id.* at A4-A5).

ARGUMENT

Petitioner contends that the Board erred in concluding that the Company's district managers are supervisors within the meaning of the National Labor Relations Act. Petitioner does not dispute that the district managers exercise supervisory authority over the carriers. Nor does it challenge the court of appeals' conclusion that substantial evidence supports the Board's finding that the carriers are employees under the right-of-control test. Petitioner contends, however, that the Board should not have used the right-of-control test to determine the status of the carriers,

but instead should have excluded the carriers from employee status "on policy grounds" (Pet. App. A11). That contention lacks merit.

1. When Congress enacted the Taft-Hartley amendments in 1947, it specifically excluded from the definition of "employee" under Section 2(3) of the Act, 29 U.S.C. 152(3), "any individual having the status of an independent contractor." As this Court explained in *NLRB* v. *United Insurance Co.*, 390 U.S. 254, 256 (1968) (footnote omitted), Congress intended by this amendment "to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act." Congress "thereby imported the common law 'right of control' test as a standard of statutory coverage." R. Gorman, *Basic Text in Labor Law* 29 (1977). See, *e.g.*, *NLRB* v. *Associated Diamond Cabs, Inc.*, 702 F.2d 912, 919-920 (11th Cir. 1983); *Air Transit, Inc.* v. *NLRB*, 679 F.2d 1095, 1098 (4th Cir. 1982); *NLRB* v. *Maine Caterers, Inc.*, 654 F.2d 131, 132-133 (1st Cir. 1981), cert. denied, 455 U.S. 940 (1982); *NLRB* v. *A. Duie Pyle, Inc.*, 606 F.2d 379, 382 (3d Cir. 1979); *Local 777, Democratic Union Organizing Committee* v. *NLRB*, 603 F.2d 862, 872-873 (D.C. Cir. 1978); *Merchants Home Delivery Service, Inc.* v. *NLRB*, 580 F.2d 966, 972-973 (9th Cir. 1978); *NLRB* v. *Phoenix Mut. Life Ins. Co.*, 167 F.2d 983, 986 (7th Cir.), cert. denied, 335 U.S. 845 (1948).

As the Court recognized in *United Insurance Co.*, 390 U.S. at 256, in requiring that the Board and courts apply common law principles in distinguishing employees from independent contractors, Congress intended specifically to override the decision in *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944). In *Hearst* the Court had upheld a more expansive approach under which the Board could determine whether individuals were covered by the Act on the basis of its view of the policies and purposes of the Act.

In that case, the Board had found that "newsboys" distributing newspapers on street corners were "employees" under the Act, notwithstanding evidence of their independent contractor status under the common law, based on the Board's view that extending statutory coverage to the "newsboys" would further the policies of the Act in favor of collective bargaining. *Id.* at 126-129, 131-132.[4] In specifically excluding independent contractors from the definition of "employee" in the 1947 amendments, Congress indicated clearly that the common law right-of-control test, rather than the Board's own policy determinations, was to govern the scope of statutory coverage, and that no special policy-based considerations apply to news carriers under Section 2(3). See *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166-168 (1971).

The description of the facts at pages 3-4, *supra*, shows that the Board properly applied the right-of-control test in concluding that the carriers are employees, and that the district managers are therefore supervisors, within the meaning of the Act. As we noted above, petitioner does not challenge the court of appeals' conclusion that substantial evidence supported the Board's finding on this point. And even if the petition could be read to raise this issue, it is not one that would warrant review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

2. This Court's decisions in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974), and *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981), do

---

[4]The "newsboys" in *Hearst*, unlike the carriers involved here, were full-time adult vendors who frequently bought and sold among themselves the locations from which they sold papers, without objection from or knowledge of the newspapers; sold competing newspapers and periodicals from their newsstands; hired assistants and relief men; and made arrangements among themselves for the sale of competing and left-over papers. 322 U.S. at 116, 119 n.17.

not support petitioner's contention that the Act "implicitly" excludes news carriers from employee status. In *Bell Aerospace Co.*, 416 U.S. at 274-290, the Court held that the legislative history of the Taft-Hartley amendments and the longstanding interpretation of the Board demonstrated that Congress intended to exclude employees properly classified as "managerial" from the definition of "employee" in Section 2(3). Contrary to petitioner's characterization (Pet. 11), in *Hendricks County* the Court rejected the claim that Congress had implicitly excluded all "confidential employees" from the statutory definition of "employee"; the Court simply approved the Board's practice of excluding from bargaining units certain employees with access to confidential labor relations information of the employer. Neither case supports the contention that, where Congress has mandated application of a right-of-control test for distinguishing employees from independent contractors, the Board is free to create an exclusion on policy grounds for individuals who otherwise qualify as employees under that test.[5]

---

[5]Petitioner's reliance (Pet. 16) on *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co., supra*, is also misplaced. There the Court in dicta stated that in doubtful cases not involving the employee/independent contractor analysis "resort must still be had to economic and policy considerations to infuse § 2(3) with meaning." The Court made clear, however, that the general agency principles mandated by the Taft-Hartley amendments may "not be ignored in distinguishing 'employees' from independent contractors." 404 U.S. at 168.

The Board decisions petitioner cites at Pet. 11-12 are similarly inapposite. In *Firmat Mfg. Corp.*, 255 N.L.R.B. 1213, 1214 (1981), enforced, 97 Lab. Cas. (CCH) ¶ 10,153 (3d Cir. 1982), and *Cedars-Sinai Medical Center*, 223 N.L.R.B. 251, 253 (1976), the Board found that a high school cooperative education student hired as an apprentice and hospital interns and residents were students rather than employees, and that the work they performed was primarily part of their education rather than part of an employment relationship. Similarly, in *Key Opportunities, Inc.*, 265 N.L.R.B. 1371, 1374 (1982), the Board concluded that clients of a sheltered workshop for the handicapped performed work as part of their therapy and rehabilitation, not as

3. Petitioner contends (Pet. 14-23) that, as a matter of "policy" (*id.* at 16, 18), the Board should have refused to find the news carriers to be employees and the district managers supervisors because of the Company's past treatment of them and in order to preserve the established collective bargaining relationship between the Company and the district managers. The Board and the court of appeals properly rejected that contention.[6]

The Act contemplates a distinct line between management and labor. See *Hendricks County*, 454 U.S. at 193 (Powell, J., concurring in part and dissenting in part). To that end Section 14(a) of the Act, 29 U.S.C. 164(a), provides that no employer shall be compelled to bargain collectively with individuals possessing supervisory status. Since employer recognition of supervisors for bargaining purposes is purely voluntary under the Act, it is settled that an employer is not precluded from claiming that individuals with a prior history of collective bargaining are supervisors with whom it no longer wishes to bargain, even when the

---

"employees" under the Act. Here, in contrast, the work done by the news carriers is not related to educational or therapeutic concerns. In *San Francisco Art Institute*, 226 N.L.R.B. 1251, 1251-1252 (1976), the Board, without deciding whether art students who worked part-time as janitors were "employees" under Section 2(3), held that the students did not constitute an appropriate bargaining unit because of the temporary and casual nature of their work and their primary status as students.

[6]This contention appears to be a variation on petitioner's argument below that the Company is equitably estopped from contesting the status of the carriers and district managers. The Board correctly concluded that, even if equitable estoppel principles would apply in this context, petitioner had not established the traditional elements of estoppel, since any detriment it suffered did not result from misleading conduct on the part of the Company (Pet. App. A55). And see *Wallace Corp.* v. *NLRB*, 323 U.S. 248, 253 (1944) (declining to apply concept of estoppel where it would "render the Board powerless to prevent an obvious frustration of the Act's purposes").

duties of those individuals remain unchanged. *Washington Post Co.*, 254 N.L.R.B. 168, 168-169 (1981); *Western Colorado Power Co.*, 190 N.L.R.B. 564, 564 (1971); *Brotherhood of Locomotive Firemen & Enginemen*, 145 N.L.R.B. 1521, 1525 n.10 (1964). Under that principle, neither the Company's stipulation in the 1970 consent agreement (which was rejected by the Board, see note 1, *supra*), nor the fact that certain Company documents refer to the carriers as "independent," precludes the Board from determining the actual status of the carriers and district managers under the Act. See *NLRB* v. *Boyer Brothers, Inc.*, 448 F.2d 555, 563-564 (3d Cir. 1971), cert. denied, 409 U.S. 878 (1972); *NLRB* v. *Montgomery Ward & Co.*, 242 F.2d 497, 502 (2d Cir.), cert. denied, 355 U.S. 829 (1957); *Virginian-Pilot/Ledger Star*, 241 N.L.R.B. 575, 575 (1979); *Eureka Newspapers, Inc.*, 154 N.L.R.B. 1181, 1184 (1965).[7]

---

[7]The Board decisions cited by petitioner (Pet. 17-18) in support of its claim that the Board ordinarily holds employers to their past characterization of news carriers' status, regardless of the evidence of their actual status under the Act, are inapposite. In *Newsday, Inc.*, 171 N.L.R.B. 1456, 1456 (1968), the employer apparently conceded before the Board that its carriers were independent contractors, not employees; moreover, the Board concluded that the facts in the record supported that classification. In *Eureka Newspapers, Inc.*, 154 N.L.R.B. at 1184, the Board stated expressly that the fact that a written agreement with the newspaper and district dealers defined the relationship as one of independent contractor was not controlling. The Board found in *Suburban Newspaper Group*, 195 N.L.R.B. 438, 438 (1972), that district managers did not supervise carriers when the record showed that the supervisors did not responsibly direct the carriers and exercised no real independent discretion with respect to hiring and replacement of carriers. In *Buffalo Courier-Express, Inc.*, 129 N.L.R.B. 932, 936-937 (1960), the Board concluded on the basis of the facts in the record that circulation salesmen did not exercise supervisory functions as to distributors. In *Kansas City Star Co.*, 76 N.L.R.B. 384, 384-388 (1948), the employer contended, and the Board found, that carriers were independent contractors, based on evidence that they enjoyed considerable control over their earnings and independence in leasing and transferring routes,

Petitioner errs in contending (Pet. 22) that under the decision below newspapers will be able to abrogate established collective bargaining relationships with circulation managers *solely* by contesting the status of news carriers. Even when carriers are shown to be employees within the meaning of Section 2(3), the Board will find circulation managers to be supervisors only where the record contains sufficient evidence that the managers possess supervisory authority. Here, it is undisputed that the managers supervise the carriers.

---

hiring assistants, and making deliveries. And the Board concluded in *San Antonio Light Division*, 130 N.L.R.B. 619, 629 (1961), that route dealers were employees, based on their limited opportunities for profit, the strict regulation of the dealers' status with respect to carriers, and the detailed control exercised by the newspaper over the dealers' methods of operation. In none of these cases did the Board suggest that some prior characterization of the individuals at issue would be dispositive of their status under the Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

ROBERT C. BELL, JR.
Attorney

National Labor Relations Board

FEBRUARY 1985

DOJ-1985-02